Supreme Court, U.S.
FILED
JAN 4 - 2007
OFFICE OF THE CLERK

No. 06-958

In The

Supreme Court of the United States

TERRENCE HAYES,

Petitioner,

against

THOMAS & BETTS CORP.,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeal, Fifth Circuit State Of Louisiana

PETITION FOR WRIT OF CERTIORARI

DAVID W. GRONER
(La. Bar Roll No. 6349)
Counsel of Record
DAVID GRONER, P.L.C.
230 West Main Street
Post Office Box 9207
New Iberia, Louisiana
70562-9207
Telephone: (337) 364-3629
Facsimile: (337) 367-2438

WALTER C. DUMAS
(La. Bar Roll No. 5163)
DUMAS & ASSOCIATES
LAW CORPORATION
Lawyer's Complex
1263 Government Street
Post Office Box 1366
Baton Rouge, Louisiana
70821-1366
Telephone: (225) 383-4701
Facsimile: (225) 383-4719

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether Petitioner's rights as guaranteed by the Fourteenth Amendment to the United States Constitution were violated by the actions of the Louisiana Fifth Circuit Court of Appeal and the Supreme Court of Louisiana in that both courts reversed a judgment rendered in favor of Petitioner even though the judgment was not before either court and appeal costs were not cast on Petitioner?

2. Whether a state Supreme Court can disregard its own rule which provides that only assigned errors are to be considered by a reviewing court, and that issues not briefed similarly will not be ruled upon, but rather, will be considered abandoned?

PARTIES TO THE PROCEEDINGS

All parties to the proceedings appear in the caption of the case on the cover page.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTION AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	6
ARGUMENT	6
I. DUE PROCESS	6
II. EQUAL PROTECTION	13
CONCLUSION	16

TABLE OF AUTHORITIES

Page

CASES

FEDERAL

Amandola v. Town of Babylon, 251 F.3d 339 (2d Cir. 2001) 12

Bankers Life & Cas. Co. v. Crenshaw, 486 U.S. 71, 108 S. Ct. 1645 (1988) 15

Beck v. Washington, 369 U.S. 541, 82 S. Ct. 955 (1962) 15

Bernal v. Fainter, 467 U.S. 216, 104 S. Ct. 2312 (1984) 13

Clark v. Jeter, 486 U.S. 456, 108 S. Ct. 1910 (1988) 14

Fields v. Legacy Health System, 413 F.3d 943 (9th Cir. 2005) 13

Martinez v. California, 444 U.S. 277, 100 S. Ct. 553 (1980) 13

Norwest Bank Nebraska, N.A. v. W.R. Grace & Co. – Conn., 960 F.2d 754 (8th Cir. 1992) 13

Pacific States Box & Basket Co. v. White, 296 U.S. 176, 56 S. Ct. 159 (1935) 7

Peace v. American General Life Ins. Co., 462 F.3d 437 (5th Cir. 2006) 7

Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 478, 108 S. Ct. 1340 (1988) 13

Twin City Fire Ins. Co. v. Adkins, 400 F.3d 293 (6th Cir. 2005) 11, 12

TABLE OF AUTHORITIES – Continued

Page

United States v. Crescent Amusement Co., 323 U.S. 173, 65 S. Ct. 254 (1944) 7

Vacco v. Quill, 521 U.S. 793, 117 S. Ct. 2293 (1997) 14

LOUISIANA STATE COURTS

Broussard v. Guilbeaux, 93-1353 (La.App. 3 Cir. 1994); 640 So.2d 509 7

Foster v. Unopened Succession of Smith, 38,386 (La.App. 2 Cir. 5/20/04); 874 So.2d 400 8

McGowan v. Ramey, 484 So.2d 785 (La.App. 1 Cir. 2/25/86) 9

Shear v. Shear, 695 So.2d 1026 (La.App. 5 Cir. 5/28/97), *rehearing denied, writ denied*, 703 So.2d 632 (La. 11/14/97) 8

Thomas v. Janzen, 800 So.2d 81 (La.App. 2 Cir. 10/3/01) 9

Vaughn v. Progressive Security Insurance, 896 So.2d 1207 (La.App. 3 Cir. 3/2/05) 9

OTHER STATE CASES

Karim v. Commonwealth, 21 Va. App. 652, 466 S.E. 2d 772 (1996) 11

M.W. v. Lofthiem, 855 So.2d 683 (Fla. Dist. Ct. App. 2003) 10

State v. Pawling, 9 Neb. App. 824, 621 N.W. 2d 821 (2000) 11

TABLE OF AUTHORITIES – Continued

Page

STATUTES

FEDERAL

28 U.S.C. §1257(c) 1

U.S.C.A. Const. Amend. 14 ..... 1, 6

STATE

C.C.P. art. 1911 5

STATE RULES

Uniform Rules – Courts of Appeal Rule 2-7.4 5

Rule IX Section 6 of the Louisiana Supreme Court Rules 1, 6

Uniform Rules – Courts of Appeal Rule 1-3 7

Uniform Rules – Courts of Appeal Rule 2-12.4 ..... 7, 9

OPINIONS BELOW

The opinion of the Louisiana Supreme Court denying the Petitioner's Application for Emergency Writ issued October 6, 2006, is reported at 938 So.2d 88 (La. 10/6/06), and is set forth at App. F.

The opinion of the Louisiana Fifth Circuit Court of Appeal issued on July 31, 2006, and is attached at App. A.

The opinion of the Louisiana Fifth Circuit Court of Appeal issued on March 28, 2006, is reported at 927 So.2d 492 (La.App. 5 Cir. 3/28/06) and is attached at App. E.

STATEMENT OF JURISDICTION

This Honorable Court has jurisdiction pursuant to 28 U.S.C. §1257(c). The opinion of the Louisiana Supreme Court was entered on October 6, 2006, denying Petitioner's Application for Supervisory Writs. The rules of the Louisiana Supreme Court, specifically Rule IX Section 6, prohibit rehearing requests for Applications for Supervisory Writs which are merely denied. Therefore, a petition for rehearing was not filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution states in pertinent part: "nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

STATEMENT OF THE CASE

On July 5, 1999, Terrence Hayes went to work at his place of employment, Kaiser Aluminum and Chemical Corp.'s plant in Gramercy, Louisiana. Mr. Hayes was a digestive outside operator who worked the evening shift which was from 6:00 p.m. to 6:00 a.m.

Shortly before 6:00 a.m., there was a power outage at the Kaiser plant. Mr. Hayes was instructed to go into the control room. After arriving in the control room, Mr. Hayes, along with Albert Jones and Walter Robbins, were instructed by Walter Hansley, supervisor of the outside control board operators at Kaiser, to go outside and close the vent valves. While in the process of attempting to close the vents, there was a violent explosion which knocked the three men backwards. When Mr. Hayes was found by Mr. Hansley, he was severely burned and unable to see. Mr. Hansley carried Mr. Hayes to an area where the showers were located and attempted to rinse the caustic material from Mr. Hayes' body. Thereafter, Mr. Hayes was transported by ambulance to St. James Hospital in Lutcher, Louisiana.

After arriving at the hospital, it was discovered that Mr. Hayes had caustic in his eyes and burns on his neck, back, arms, testicles, legs, and buttocks. Mr. Hayes was subsequently transferred to the Tulane Medical Center, New Orleans, Louisiana, for treatment to his eyes and body.

As a result of his injuries and prior to the October 8, 2001, trial date, Mr. Hayes endured in excess of twenty (20) surgeries on his eyes, none of which repaired his eyesight. Mr. Hayes is totally blind in his left eye, and he

has limited, blurry vision in his right eye. On July 3, 2000, Mr. Hayes filed suit to recover damages for his injuries.

Trial began on October 8, 2001, and ended on November 19, 2001. The jury returned a verdict of fault as follows: (1) Kaiser 75%, (2) PCS 20%, and (3) Excel 5%, and awarded damages of $20,307,000 to Terrence Hayes. The judgment of $20,307,000 included $5,400,000 for past and future medical expenses including life care plan.

Terrence Hayes filed a Motion for Judgment Notwithstanding the Verdict, alternatively, a New Trial, and Change of Venue separate and apart from the Motion for Judgment Notwithstanding the Verdict, a New Trial and Change of Venue filed by Kaiser and AXA, and counsel representing the class in the litigation.

Although, the December 16, 2002, judgment did not address damages for the class, Thomas & Betts Corp. agreed to and reached a settlement with the class.

On December 16, 2002, the trial court granted Terrence Hayes' Motion for Judgment Notwithstanding the Verdict and reallocated fault: (1) Kaiser 60%, (2) Thomas and Betts Corp. 25%, (3) PCS 10%, and (4) Excel 5%. The trial court also granted Mr. Hayes' alternative motions for a new trial and for a change of venue. Kaiser and AXA's separate Motion for Judgment Notwithstanding the Verdict alternatively, Motion for New Trial and for a Change of Venue was also granted.

Thomas and Betts Corp. moved for an order of suspensive appeal from the judgment rendered and signed on December 16, 2002. On January 13, 2003, the trial court granted Thomas and Betts Corp. a suspensive appeal upon furnishing security in the amount of $156,000,000.

On October 2, 2004, the record was lodged with the Louisiana Fifth Circuit Court of Appeal.

Prior to the record being lodged, Terrence Hayes filed a devolutive appeal. After the record was lodged, Terrence Hayes filed a motion to dismiss his devolutive appeal, and on November 19, 2004, the motion was granted by the Louisiana Fifth Circuit Court of Appeal.

After hearing arguments on January 9, 2006, the Louisiana Fifth Circuit Court of Appeal on March 28, 2006, rendered its opinion reversing the trial court's December 16, 2002, Judgment which granted a Motion for Judgment Notwithstanding the Verdict in favor of Kaiser and AXA.

The Judgment Notwithstanding the Verdict that was granted in favor of Terrence Hayes was not discussed in the Louisiana Fifth Circuit Court of Appeal Court of Appeal's March 28, 2006, opinion. Also, the Louisiana Fifth Circuit Court of Appeal only cast Kaiser and AXA for appeal costs.

On June 1, 2006, Terrence Hayes filed a motion to enforce judgment, and the trial court set the hearing for July 10, 2006, at 9:30 a.m. The hearing was held, and the matter was taken under advisement, and on July 20, 2006, the trial court granted Terrence Hayes' Motion to Enforce Judgment.

Prior to filing an application for supervisory writs with the Louisiana Fifth Circuit Court of Appeal, Thomas & Betts Corp. had hand-delivered to the trial judge's office Notice of Intent to Seek Supervisory Writ, Request for Return Date, and Motion for Stay, which was denied by the trial court because the judgment of July 20, 2006, was

a final judgment which could only be appealed and not subject to a writ application. App. G. Louisiana Code of Civil Procedure Article 1911 provides that final judgment are subject to appeals not writs.

On July 26, 2006, at approximately 4:21 p.m., Terrence Hayes' counsel received by facsimile Thomas & Betts Corp.'s Application for Supervisory Writ, Request for Expedited Consideration, and Request for Stay Order that was filed in the Louisiana Fifth Circuit Court of Appeal. Thereafter, counsel for Terrence Hayes' advised the Louisiana Fifth Circuit Court of Appeal in writing that he would file an Opposition to Thomas & Betts Corp.'s Writ Application and Request for Stay Order.

On July 27, 2006, counsel for Terrence Hayes contacted the Fifth Circuit Court of Appeal by telephone and was advised he had until noon on July 28, 2006, to file an opposition to Thomas & Betts Corp.'s Writ Application and Request for Stay Order. Terrence Hayes' Opposition was timely filed before noon on July 28, 2006.

Also, on July 28, 2006, Terrence Hayes' counsel filed a Motion to Dismiss and a Supplemental Motion to Dismiss Writ Application pursuant to Uniform Rules – Courts of Appeal Rule 2-7.4 and Incorporated Memorandum because the trial court denied Thomas & Betts Corp.'s time to apply for supervisory writ to review its July 20, 2006, final judgment which is only subject to an appeal, not a writ. Terrence Hayes also filed a Motion to Dismiss, Alternatively, Opposition to Thomas & Betts's Notice of Intent to Seek Supervisory Writ, Request for Return Date, and Motion for Stay in the trial court.

On July 31, 2006, the Louisiana Fifth Circuit Court of Appeal reversed the July 20, 2006, judgment of the trial court.

On October 6, 2006, the Louisiana Supreme Court denied writs affirming the Fifth Circuit Court of Appeal's reversal of the trial court's judgment of July 20, 2006.

A rehearing was not requested with the Louisiana Supreme Court because Rule IX Section 6 of the Louisiana Supreme Court Rules provides in part "An application for rehearing will not be considered when the court has merely granted or denied an application for a writ of certiorari or a remedial or other supervisory writ." Petitioner's writ was merely denied.

REASONS FOR GRANTING THE PETITION

The Louisiana Supreme Court failed to follow procedures established under state law when it erroneously treated Petitioner's judgment as if it had been successfully reversed on appeal. This decision conflicts with this Honorable Court's precedents and denies Petitioner's right of Due Process and Equal Protection of Law as guaranteed by the Fourteenth Amendment to the United States Constitution.

ARGUMENT

I. DUE PROCESS

It is clear beyond contention, from this Court's as well as other courts' precedents, that only assigned errors are to be considered by a reviewing court, and that issues not

briefed similarly will not be ruled upon but, rather, will be considered abandoned. *United States v. Crescent Amusement Co.*, 323 U.S. 173, 65 S. Ct. 254 (1944) (only errors assigned will be considered by the Supreme Court); *Pacific States Box & Basket Co. v. White* 296 U.S. 176, 56 S. Ct. 159 (1935) (objection which was not made below, was not discussed by lower court, and was not included in assignment of errors filed on appeal need not be considered by reviewing court); *Peace v. American General Life Ins. Co.*, 462 F.3d 437 (5th Cir. 2006) (employer's claim that alleged agreement to provide employee with deferred compensation in form of single premium annuity, qualified as "top hat" plan under ERISA, was not adequately briefed and would not be addressed); *Broussard v. Guilbeaux*, 93-1353 (La.App. 3 Cir. 1994); 640 So.2d 509 (only issues that have been submitted to trial court and raised in specifications or assignments of error ordinarily will be considered on appeal).

These principles are also embodied in the Uniform Rules for the Louisiana Courts of Appeal. Rule 1-3 states, in pertinent part, that "[t]he Courts of Appeal will review *only* issues which were submitted to the trial court and which are contained in specifications or assignments of error, unless the interest of justice clearly requires otherwise." (Emphasis added.) Here, there is no countervailing interest of justice that could justify a departure from the general rule. On the contrary, the interest of justice was undermined by the actions of the Louisiana Fifth Circuit Court of Appeal and the Supreme Court of Louisiana.

In addition, Rule 2-12.4 in the same set of rules provides, in pertinent part, that "[a]ll specifications or assignments of error *must* be briefed. The court may consider as abandoned any specification or assignment of

error which has not been briefed." (Emphasis added.) Petitioner does not dispute that initially it was within the discretionary power of the Louisiana Fifth Circuit Court of Appeal to consider any claim or issue from the court below; nonetheless, once the Court of Appeal did *not* so consider, review, or overturn the judgment notwithstanding the verdict which Petitioner had obtained against Thomas & Betts Corporation ("T&B"), that judgment became final, unreviewable, and enforceable in the manner which Petitioner sought to accomplish in his Motion to Enforce Judgment.

In circumstances similar to those in the instant case, the court in *Foster v. Unopened Succession of Smith*, 38,386 (La.App. 2 Cir. 5/20/04); 874 So.2d 400 ruled that that portion of a judgment allocating 15% of the fault to the landowners, in an action arising when a pedestrian tripped on a pipe that allegedly extended from under a curb, was final and could not be reversed or modified on appeal, where the landowners only answered the Department of Transportation and Development's (DOTD) appeal, which challenged that portion of the judgment allocating 70% of the fault to DOTD. The landowners' answer permitted them to seek alteration of the judgment vis-a-vis the DOTD, but did not have the effect of an appeal as to any portion of the judgment rendered either in favor of or against a party who had not appealed. Likewise, in the instant case, the judgment for Petitioner and against T&B became final when it was not appealed to or overturned by the Louisiana Fifth Circuit Court of Appeal.

In *Shear v. Shear*, 695 So.2d 1026 (La.App. 5 Cir. 5/28/97), *rehearing denied, writ denied*, 703 So.2d 632 (La. 11/14/97), the Fifth Circuit Court of Appeal held the

assigning of error but not briefing the error, but only arguing the error, is deemed abandoned under Uniform Rules – Courts of Appeal Rule 2-12.4.

Other appellate courts have ruled that failure to assign error constitutes an abandonment of the appeal. In *McGowan v. Ramey*, 484 So.2d 785 (La.App. 1 Cir. 2/25/86), the First Circuit held that an appellant who brought an appeal but failed to assign error "constituted abandonment of the appeal." In *Thomas v. Janzen*, 800 So.2d 81 (La.App. 2 Cir. 10/3/01), the Second Circuit held the failure to raise as an assignment of error constitutes abandonment of the appeal. In *Vaughn v. Progressive Security Insurance*, 896 So.2d 1207 (La.App. 3 Cir. 3/2/05), the Third Circuit held assigned errors not briefed are deemed abandoned and are not addressed by the Court. Citing Uniform Rules – Courts of Appeal Rule 2-12.4.

Further, Thomas & Betts Corp. admits in its Application for Supervisory Writs that Terrence Hayes' Judgment Notwithstanding the Verdict was not before the Court when it states in the footnote on page 9 "this court knew, as T&B knew, that the parties carrying the ball on the JNOV motion were Kaiser and AXA, and that the issues and arguments were identical." This clearly shows Thomas and Betts Corp.'s appeal only involved the JNOV of Kaiser and AXA.

To further show that Thomas & Betts Corp. had abandoned Terrence Hayes' Judgment Notwithstanding the Verdict, Thomas and Betts Corp.'s Form 10-Q filing with the U.S. Securities and Exchange Commission (SEC) for the period ending March 31, 2006, and filed on May 5, 2006, under the heading Contingencies, Legal

Proceedings, Kaiser Litigation, beginning on page 16 and ending on page 17, states on page 17 the following:

> "In March 2006, the Louisiana Court of Appeals unanimously reversed the trial court's decision and reinstated the jury verdict of no liability in favor of the Corporation. In April 2006, the plaintiffs filed with the Louisiana Supreme Court an appeal of the Court of Appeals decision. Management intends to vigorously contest the appeal by plaintiffs." (App. K)

Even in its May 5, 2006, SEC filing, Thomas and Betts Corp. states that *the plaintiffs* filed with the Louisiana Supreme Court. Terrence Hayes did not file a writ application with the Louisiana Supreme Court in reference to the March 28, 2006, judgment of the Louisiana Fifth Circuit Court of Appeal. The judgment did not address Terrence Hayes' Judgment Notwithstanding the Verdict. Again, Thomas and Betts Corp. was only concerned with Kaiser's and AXA's 88.8 Million Dollar Judgment Notwithstanding the Verdict. Therefore, the SEC filing is consistent with Thomas and Betts Corp.'s actions as being only concerned with Kaiser's and AXA's Judgment Notwithstanding the Verdict.

A court's failure to follow procedures established under state law, as clearly happened here when the Louisiana Fifth Circuit Court of Appeal and the Supreme Court of Louisiana erroneously treated Petitioner's judgment against T&B as if it had been successfully reversed on appeal, can by itself constitute a denial of due process. *See, e.g., M.W. v. Lofthiem*, 855 So.2d 683 (Fla. Dist. Ct. App. 2003) (even if order existed prohibiting juvenile's use of marijuana, in finding juvenile in contempt of court for having smoked marijuana in week prior to appearing

before court, trial court's failure to follow procedures required in juvenile rule governing indirect contempt violated juvenile's due process protections required in indirect criminal contempt proceedings); *State v. Pawling*, 9 Neb. App. 824, 621 N.W.2d 821 (2000) (trial court's failure to follow procedure established by statute allowing sentencing court to amend a probation order violated defendant's due process rights, and the procedure followed, when probation officer telephoned judge to obtain modification of probation order, on basis that defendant had violated terms of his probation, was so flawed that order was clearly void); *Karim v. Commonwealth*, 21 Va. App. 652, 466 S.E.2d 772 (1996) (juvenile court's failure to follow strictly statutory notice procedures related to initiating proceedings against juvenile and transferring jurisdiction to circuit court denied juvenile substantive right and constitutional guarantee of due process).

By contrast with the wrong done to Petitioner in the instant case, the decision in *Twin City Fire Ins. Co. v. Adkins*, 400 F.3d 293 (6th Cir. 2005), is instructive. There, the Sixth Circuit held that the Ohio Supreme Court did not violate the Due Process Clause in an insurance dispute by taking up an issue of the defendant automobile insurer's potential liability for uninsured/underinsured motorist (UM/UIM) coverage, despite the court's failure to follow its own rule, governing certification by the state court of appeals, by first identifying the issue in its briefing order. Thus, the decision of the case, which was in favor of the insurer, based on an initially unidentified issue, was not void ab initio and deserved full faith and credit in a subsequent federal diversity action. There was no due process violation because, although the insureds in the state case did not address the UM/UIM issue in their

initial brief, after the insurer had addressed it in its brief, the insureds had an opportunity to reply; moreover, the Ohio Supreme Court had considered and rejected a number of arguments against the insurer's position.

Similarly, in *Amandola v. Town of Babylon*, 251 F.3d 339 (2d Cir. 2001), the Second Circuit Court of Appeals did not violate the due process rights of a town when, on appeal from the denial of preliminary injunctive relief, and without notice to the parties, it reached the merits of an action in which a church and its pastor asserted a free speech challenge to the town's revocation of a permit allowing them to use a town facility for religious worship. Due process rights were not infringed, because the court's findings on the merits were based on undisputed facts, and the town had fully briefed and argued its position on the merits.

In the case at bar, however, unlike in *Adkins* and *Amandola*, when first the Louisiana Fifth Circuit Court of Appeal and then the Supreme Court of Louisiana, treated Petitioner's judgment against T&B as if it had been assigned as an error, briefed and successfully reversed on appeal, when in fact neither of those things had happened, Petitioner was deprived of its judgment without due process.

As the authorities discussed, *supra*, indicate, the errors committed by the Louisiana Fifth Circuit Court of Appeal and the Supreme Court of Louisiana are not merely violations of state judicial procedure but, rather, are of constitutional dimension. The actions of those courts deprived Petitioner of clearly established forms of property, without constitutionally mandated due process. A cause of action, especially when, as here, it is embodied in

a final, unreviewable judgment, is a form of property entitling those who hold such an interest to due process protections. *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 485, 108 S. Ct. 1340, 1345 (1988) ("Appellant's interest is an unsecured claim, a cause of action against the estate for an unpaid bill. Little doubt remains that such an intangible interest is property protected by the Fourteenth Amendment."); *Martinez v. California*, 444 U.S. 277, 281-82, 100 S. Ct. 553, 557 (1980) ("Arguably, the cause of action for wrongful death that the State has created is a species of "property" protected by the Due Process Clause."); *Fields v. Legacy Health System*, 413 F.3d 943 (9th Cir. 2005) (a party's property right in a cause of action vests when a final unreviewable judgment is obtained); *Norwest Bank Nebraska, N.A. v. W.R. Grace & Co. – Conn.*, 960 F.2d 754 (8th Cir. 1992) (a judgment is a property right protected by the state due process clause).

II. EQUAL PROTECTION

The different levels of scrutiny employed to decide an equal protection challenge to government legislation or actions are well settled and familiar. At one end of the spectrum, when the government discriminates on the basis of a "suspect" classification, or when the classification implicates a fundamental constitutional right, the difference in treatment can be sustained against an equal protection attack only if it can withstand strict judicial scrutiny; to withstand strict scrutiny, the law or action must advance a compelling state interest by the least restrictive means available. *Bernal v. Fainter*, 467 U.S. 216, 104 S. Ct. 2312 (1984) (Texas statute requiring that a

notary public be a United States citizen discriminates based on alienage and violates equal protection clause).

At the other end of the spectrum, if a legislative classification or distinction neither burdens a fundamental right nor targets a suspect class, the Supreme Court will uphold it against an equal protection challenge so long as it bears a rational relation to some legitimate governmental end. *Vacco v. Quill*, 521 U.S. 793, 117 S. Ct. 2293 (1997) (for purposes of constitutional equal protection analysis, legislative classification in New York's prohibition of assisting suicide, while permitting withdrawal of life-sustaining treatment, bore rational relation to legitimate ends of prohibiting intentional killing and preserving life, preventing suicide, maintaining physicians' role as patients' healers, protecting vulnerable people from indifference, prejudice, and psychological and financial pressure to end their lives, and avoiding possible slide towards euthanasia).

There also is a third, intermediate level of equal protection analysis, which is employed when certain types of classifications, or certain constitutional rights, are implicated. To withstand intermediate scrutiny under an equal protection analysis, a classification must be substantially related to an important governmental objective. *Clark v. Jeter*, 486 U.S. 456, 108 S. Ct. 1910 (1988) (Pennsylvania's six-year statute of limitations for paternity actions did not withstand heightened, intermediate scrutiny under equal protection clause; even six years did not necessarily provide reasonable opportunity to assert claim on behalf of illegitimate child, since statute was not reasonably related to Pennsylvania's interest in avoiding litigation of stale or fraudulent claims).

Notwithstanding the various levels of equal protection that have been recognized, an important, overarching consideration that must be borne in mind is that arbitrary and irrational discrimination violates the Equal Protection Clause under even the Supreme Court's most deferential standard of review. *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 108 S. Ct. 1645 (1988). Here, Petitioner submits that he has been treated differently from similarly situated parties who have obtained final judgments that have not been erroneously rendered unenforceable in a subsequent enforcement proceeding, as occurred here, and that such a difference in treatment cannot be justified under even the most deferential equal protection analysis. Simply put, the actions of the Louisiana Fifth Court of Appeal and the Supreme Court of Louisiana were arbitrary and bore no rational relationship to a legitimate state purpose.

In *Beck v. Washington*, 369 U.S. 541, 82 S. Ct. 955 (1962), the Court ruled that the failure of the State of Washington to follow certain state procedures designed to ensure an unbiased grand jury was not a denial of equal protection, in the absence of a showing that a fair grand jury proceeding was not obtained. Given that ultimate outcome, the accused was not denied equal protection in the proceeding before the state grand jury because of the alleged fact that state law was misapplied. In effect, the Court in *Beck* reasoned that whatever injurious effects may have flowed from the failure to follow state law were cured, or legally erased, by the fact that a fair grand jury was assembled. The clear inference from the case is that, if, as in the case at bar, the damage from the failure to follow state law is *not* cured, there may be a denial of due process and of equal protection of law because of that failure to adhere to state law.

CONCLUSION

The only conclusion that can be reached in this matter is that the Louisiana Supreme Court failed to follow procedures established under state law, and more importantly, precedents of this Honorable Court and erroneously treated Petitioner's judgment as if it had been successfully reversed on appeal by the Louisiana Fifth Circuit Court of Appeal. This action denied Petitioner's right of Due Process and Equal Protection of Law. This Honorable Court should grant Petitioner's writ application and reverse the judgment of the Louisiana Supreme Court reinstating the July 20, 2006, judgment of the trial court.

Respectfully submitted,

DAVID W. GRONER
(La. Bar Roll No. 6349)
DAVID GRONER, P.L.C.
230 West Main Street
Post Office Box 9207
New Iberia, Louisiana 70562-9207
Telephone: (337) 364-3629
Facsimile: (337) 367-2438

WALTER C. DUMAS
(La. Bar Roll No. 5163)
DUMAS & ASSOCIATES LAW CORPORATION
Lawyer's Complex
1263 Government Street
Post Office Box 1366
Baton Rouge, Louisiana 70821-1366
Telephone: (225) 383-4701
Facsimile: (225) 383-4719

Attorneys for Petitioner

INDEX TO APPENDICES

		Page
Appendix A	Louisiana Fifth Circuit Court of Appeal decision of July 31, 2006	App. 1
Appendix B	Trial Court's order of July 28, 2006	App. 5
Appendix C	Trial Court's Reasons and Judgment of July 20, 2006	App. 6
Appendix D	Trial Court's order of June 5, 2006	App. 12
Appendix E	Louisiana Fifth Circuit Court of Appeal's opinion of March 28, 2006	App. 14
Appendix F	Louisiana Supreme Court's opinion denying Terrence Hayes' Application for Supervisory Writ of October 6, 2006	App. 35
Appendix G	Thomas & Betts Corp.'s Notice of Intent to Seek Supervisory Writ, Request for Return Date, and Motion for Stay	App. 36
Appendix H	Thomas & Betts Corp.'s Application for Supervisory Writ – Request for Expedited Consideration, and Request for Stay Order	App. 38
Appendix I	Terrence Hayes' Opposition to Thomas & Betts Corp.'s Application for Supervisory Writ and Exceptions	App. 63
Appendix J	Terrence Hayes' Motion to Enforce Judgment	App. 81
Appendix K	Thomas & Betts Corp.'s Form 10-Q Filing for the period ending March 31, 2006, and filed May 5, 2006	App. 96

APPENDIX A

Application For Writs

No. '06-C-555

COURT OF APPEAL, FIFTH CIRCUIT

STATE OF LOUISIANA

JUL 26, 2006

/s/ Glyn Rae Waguespack

Deputy Clerk

IN RE: GRAMERCY PLANT EXPLOSION AT KAISER

IN RE THOMAS AND BETTS CORP.

APPLYING FOR SUPERVISORY WRIT FROM THE TWENTY-THIRD JUDICIAL DISTRICT COURT, PARISH OF ST. JAMES, STATE OF LOUISIANA, DIRECTED TO THE HONORABLE PEGRAM J. MIRE JR., DIVISION "D", NUMBER 25,975

WRIT GRANTED

(SEE ATTACHED)

Gretna, Louisiana, this 31st day of July, 2006.

Attorneys for Relator:

Louis C. LaCour, Jr.
Raymond P. Ward
Attorneys at Law
701 Poydras Street
Suite 4500 One Shell Square
New Orleans, LA 70139
(504) 585-0328

Ernest P. Gieger, Jr.
Andrew A. Braun
Attorneys at Law
701 Poydras Street
Suite 4800 One Shell Square
New Orleans, LA 70139
(504) 561-0400

Robert E. Winn
Sharon C. Mize
Attorneys at Law
201 St. Charles Avenue
35th Floor
New Orleans, LA 70170-3500
(504) 582-1500

Attorneys for Respondent:

Walter C. Dumas
Attorney at Law
1263 Government Street
Baton Rouge, LA 70802
(225) 383-4701

IN RE: GRAMERCY PLANT EXPLOSION AT KAISER

NO. 06-C-555
FIFTH CIRCUIT
COURT OF APPEAL
STATE OF LOUISIANA

WRIT GRANTED

Relator-defendant, Thomas & Betts Corporation ("T&B"), seeks writs from the trial court's July 20, 2006 judgment on respondent-plaintiff, Terrence Hayes', motion to enforce judgment.

The judge who has been given notice of intention to seek writs shall immediately set a reasonable return date

within which the application shall be filed in the appellate court. Uniform Rules-Courts of Appeal, Rule 4-3. However, relator's timely notice of intention to seek writs was denied by the trial court. When a relator makes a timely and genuine attempt to obtain the judge's signature on the order for which review is sought, the writ should not be refused. *See, City of New Orleans v. Benson*, 95-2436 (La.App. 4 Cir. 12/14/95), 665 So.2d 1202. Accordingly, the writ will be considered.

On November 19, 2001, the jury in this matter returned a verdict that absolved T&B of fault. Afterwards, respondent was among those plaintiffs filing motions for judgment notwithstanding the verdict ("JNOV"), Noting that, "[a]ll plaintiffs subsequently brought Motions ... requesting a JNOV against Thomas & Betts," the trial court granted "the motion for JNOV." T&B appealed and this Court, in *In re Gramercy Plant Explosion at Kaiser*, 04-1151 (La.App. 5 Cir. 3/28/06), 927 So.2d 492, *writ denied*, 06-1003 (La. 6/14/06), 929 So.2d 1271, found that the trial court erred in granting the JNOV and decreed, "the judgment of the district court is reversed and the jury verdict is reinstated." Therefore, the jury verdict absolving T&B of fault in this matter was thereby reinstated by this Court. Accordingly, we find that the trial court erred in granting respondent's motion to enforce judgment and do hereby vacate that judgment.

Gretna, Louisiana, this 31st day of July, 2006.

/s/ FHW
JUDGE FREDERICKA HOMBERG WICKER

/s/ EAD Jr
CHIEF JUDGE EDWARD A. DUFRESNE, JR.

/s/ WJR
JUDGE WALTER J. ROTHSCHILD

APPENDIX B

TWENTY-THIRD JUDICIAL DISTRICT COURT
PARISH OF ST. JAMES
STATE OF LOUISIANA

In re: Gramercy Plant Explosion at Kaiser

Master Docket No. 25,975 Division D
Applies to No. 26,861

Filed: July 28, 2006 /s/ Jan Donaldson
Deputy Clerk of Court

Order

The Court grants Thomas & Betts Corp. 30 days, or until August 19, 2006, to apply to the Court of Appeal for a supervisory writ to review this Court's judgment of July 20, 2006 on plaintiff Terrence Hayes's motion to enforce judgment. **DENIED**

The Court [grants/denies] Thomas & Betts Corp.'s motion to stay the July 20, 2006 judgment.

So ordered in Donaldsonville, Louisiana, on July 28, 2006.

/s/ Pegram J. Mire, Jr.
Hon. Pegram J. Mire, Jr., Judge

APPENDIX C

IN RE: GRAMERCY PLANT EXPLOSION AT KAISER PARISH OF ST. JAMES

NO. 25,975 Division "D"

23rd JUDICIAL DISTRICT COURT

STATE OF LOUISIANA

/s/ J. Tabor
DEPUTY CLERK OF COURT

FILED: July 24, 2006

JUDGMENT

THIS MATTER was heard on July 10, 2006, pursuant to the Plaintiff's Motion to Enforce Judgment and for an Order Directing the Clerk of Court, Thomas & Betts Corporation and its Security Insurers to Show Cause Why the Money Judgment Rendered in Favor of Terrence Hayes Should Not Be Satisfied.

This case arises from a catastrophic explosion at the Kaiser Aluminum and Chemical Corporation's plant in Gramercy, Louisiana in which Terrence Hayes, one of the many plaintiffs and mover in this matter before the Court, was severely injured. The trial in this matter began on October 8, 2001, and lasted until November 19, 2001. The jury returned a verdict awarding damages of twenty million three hundred seven thousand and 00/100 ($20,307,000.00) dollars to Terrence Hayes and allocated fault among the defendants as follows:

Kaiser Aluminum	75%
PCS	20%
Excel	5%

Terrence Hayes filed a motion for Judgment Notwithstanding the Verdict, and alternatively, for new trial which was granted by this Court and signed on December 16, 2006. Kaiser and Axa also filed a motion for motion for Judgment Notwithstanding the Verdict. and alternatively, for new trial The Court did not change the amount of damages awarded to Terrence Hayes, but subsequently reallocated fault as follows:

Kaiser Aluminum	60%
PCS	10%
Excel	5%
Thomas & Betts Corp	25%

The trial Court did award Kaiser/Axa combined damages of three hundred thirty five million and 00/100 ($335,000,000) dollars. The trial Court also provisionally granted Kaiser/Axa and Terrence Hayes' Motion for New Trial in the event that the JNOV was reversed on appeal.

Thomas & Betts Corporation filed a Suspensive Appeal in the Fifth Circuit Court of Appeal after furnishing security in the amount of one hundred fifty six million and 00/100 ($156,000,000) dollars. Thomas & Betts Corporation listed its Assignment of Errors in its brief as follows:

1. The trial court usurped the jury's fact-finding function when it ignored substantial record evidence supporting the jury's verdict and **granted Kaiser's and Axa's motion for judgment notwithstanding the verdict.**
2. The trial court erroneously ordered a (conditional) new trial despite the absence of any prejudicial irregularity in the course of the trial.

3. The trial court's grant of a change of venue (in the event of a new trial) is unsupported by the record and is inconsistent with La.C.C.P. Art. 122.

4. The trial court erred by failing to exclude damages to non-Kaiser entities from its award and by failing to reduce the award to account for depreciation and for operational betterments inherent in the rebuilt plant.

Nowhere in Thomas and Betts Corporation's Assignment of Errors listed on page viii of its Appellate Brief do they mention the JNOV granted in favor of Mr. Terrence Hayes. The Assignment of Errors only specifically mentions Kaiser and Axa.

On March 28, 2006, the Fifth Circuit Court of Appeal reversed the December 16, 2002, judgment of the trial court granting the NOV and the costs of the appeal were assesses to Kaiser and Axa. On page seven of the Judgment rendered by the Fifth Circuit, the Court stated that "originally T&B and Hayes appealed; Hayes, however, dismissed his appeal and ***only the issues raised by T&B are before us.***" The Court then went on to specifically list the assignment of errors raised by Thomas and Betts Corporation.

The plaintiff, in his Motion to Enforce Judgment, is arguing that Thomas and Betts Corporation abandoned or did not properly appeal the Trial Court's decision to grant Terrence Hayes' JNOV because they failed to specifically assign errors to this part of the Trial Court's decision or even mention the JNOV granted in favor of Terrence Hayes anywhere in its brief or the conclusion to its brief. The plaintiff cites 2-12.4 of Louisiana's Uniform Rules for the Courts of Appeal which states that "the appellant's brief

shall set forth a specification or assignment of alleged errors relied upon, the issues presented for review and argument confined strictly to the issues of the case." Rule 2-12.4 further states that "all specifications or assignments of error must be briefed and the court may consider abandoned any specification or assignment of error which has not been briefed." The plaintiff also points to several cases which stand for the proposition that failure to raise an assignment of error or brief it on appeal renders that part of the appeal abandoned. Please see *Shear v. Shear*, 695 So. 2d 1026 (La. App. 5 Cir. 5/28/97), rehearing denied, writ denied, 703 So. 2d 632 (La. 11/14/97); *Mcgowan v. Rainey*, 484 So. 2d 785 (La. App. 1 Cir. 2/25/86).

Based on the plain reading of this uniform rule and the cases cited in plaintiff's memorandum in support, the Court finds that Thomas and Betts abandoned its appeal as to the JNOV granted in favor of Terrence Hayes. As mentioned previously, in Thomas and Betts Corporation's first assignment of error they state that "the trial court usurped the jury's fact-finding function when it ignored substantial record evidence supporting the jury's verdict and ***granted Kaiser's and Axa's motion for judgment notwithstanding the verdict.***" This assignment of error does not mention the JNOV granted in favor of Terrence Hayes. In such an intricate, detail-oriented case which involved numerous parties filing many different motions, the Court can only speculate as to why Thomas and Betts Corporation did not specifically mention each aspect of the trial Court's ruling that it wished to have reviewed on appeal. At trial, Terrence Hayes' JNOV was filed separate and apart from Kaiser and Axa's JNOV. Therefore, the Court finds that is should have been specifically mentioned on appeal. The Court also points to the language in

the written Judgment of the Fifth Circuit Court of Appeal which clearly stated that Hayes' appeal was dismissed and the only issues before the Court were the ones raised by Thomas and Betts.

Based on all of the above and foregoing reasons, the Court finds that the original Judgment in favor of Terrence Hayes is final and should be satisfied from the security for appeal posted by the Federal Insurance Company, the Insurance Company of the State of Pennsylvania and the Great American Insurance Company on behalf of Thomas and Betts Corporation.

READ, RENDERED AND SIGNED in Chambers in Donaldsonville, Louisiana this 20 day of July, 2006.

/s/ Pegram J. Mire, Jr.
PEGRAM J. MIRE, JR., JUDGE
23rd JUDICIAL DISTRICT COURT
DIVISION "D"

IN RE: GRAMERCY PLANT	**NO. 25,975**
	DIVISION "D"
EXPLOSION AT KAISER	**23RD JUDICIAL**
PARISH OF ST. JAMES	**DISTRICT COURT**
	STATE OF LOUISIANA
FILED: July 24, 2006	**/s/ J. Tabor**
	DEPUTY CLERK
	OF COURT

JUDGMENT

THE COURT, after considering the entire record herein, the memoranda, the oral arguments and applicable law;

IT IS ORDERED, ADJUDGED AND DECREED that the Motion to Enforce Judgment, filed by the plaintiff, Terrence Hayes is hereby, **GRANTED.**

READ, RENDERED, AND SIGNED this 20 day of July, 2006, in Chambers in Donaldsonville, Louisiana.

/s/ Pegram J. Mire, Jr.
PEGRAM J. MIRE, JR., JUDGE
23rd JUDICIAL DISTRICT COURT
DIVISION "D"

APPENDIX D

TWENTY-THIRD JUDICIAL DISTRICT

PARISH OF ST. JAMES

STATE OF LOUISIANA

IN RE: GRAMERCY PLANT EXPLOSION AT KAISER	**MASTER DOCKET NO. 25975**
	DIVISION "D"

ORDER

(Filed Jun. 1, 2006)

Considering the foregoing Motion to Enforce Judgment and for an Order Directing Clerk of Court, Thomas & Betts Corp., and its security insurers, Federal Insurance Company, The Insurance Company of the State of Pennsylvania, and Great American Insurance Company, to show cause why the money judgment rendered in favor of Terrence Hayes should not be satisfied:

IT IS ORDERED, ADJUDGED AND DECREED that the Clerk of Court for the Parish of St. James, Thomas & Betts Corp. and its security insurers show cause on the 10 day of July, 2006, at 9 o'clock a.m., why:

1. They should not pay Thomas & Betts Corp.'s 25 percent fault allocation of the judgment rendered herein on December 16, 2002, with interest according to law out of the security posted on behalf of Thomas & Betts Corp.

2. Alternatively, why the Clerk of Court should not pay Thomas & Betts Corp.'s 25 percent fault allocation of the judgment rendered on December 16, 2002, with interest according to law out of the

security posted on behalf of Thomas & Betts Corp.

Donaldsonville, Louisiana, 5th day of June, 2006.

/s/ Pegram Mire
JUDGE, 23rd JUDICIAL DISTRICT COURT

APPENDIX E

IN RE: GRAMERCY PLANT EXPLOSION AT KAISER	NO. 04-CA-1151 C/W 04-CA-1152 THROUGH 04-CA-1991
(LODGED AS CARL BELL, ET AL. VERSUS KAISER ALUMINUM AND CHEMICAL CORPORATION)	FIFTH CIRCUIT
	COURT OF APPEAL
	STATE OF LOUISIANA

ON APPEAL FROM THE TWENTY-THIRD JUDICIAL DISTRICT COURT, PARISH OF ST. JAMES, STATE OF LOUISIANA, NO. 25975 c/w 25974 c/w 25979 c/w 25980 c/w 25984 c/w 25986 c/w 25997 c/w 25999 c/w 26542 c/w 26576 c/w 26591 c/w 26620 c/w 26655 c/w 26670 c/w 26671 c/w 26679 c/w 26775 c/w 26785 c/w 26817 c/w 26820 c/w 26821 c/w 26822 c/w 26826 c/w 26828 c/w 26829 c/w 26837 c/w 26839 c/w 26840 c/w 26841 c/w 26842 c/w 26843 c/w 26856 c/w 26860 c/w 26861 c/w 26863 c/w 26864 c/w 26865 c/w 26866 c/w 26868 c/w 26874 c/w 26876, DIVISION "D," HONORABLE PEGRAM J. MIRE, JR., JUDGE PRESIDING

March 28, 2006

SUSAN M. CHEHARDY
JUDGE

Panel composed of Judges Susan M. Chehardy, Clarence E. McManus, and Walter J. Rothschild

WALTER C. DUMAS
PATTI DURIO HATCH
Dumas and Associates Law Corporation
P. O Box 1366
Baton Rouge, Louisiana 70821
RICHARD J. ARSENAULT
Neblett, Beard & Arsenault
P.O. Box 1190
Alexandria, Louisiana 71309

COUNSEL FOR PLAINTIFF/APPELLEE/2ND APPELLANT, TERRENCE HAYES, INDIVIDUALLY AND ON BEHALF OF HIS MINOR CHILD, JOCELYN PEARL HAYES

CALEB H. DIDRIKSEN
DIANE R. COSENZA
RONALD J. VENTOLA
JOHN J. RUSKIN
Didricksen Law Firm
P.O. Box 1600
Gonzales, Louisiana 70707
COUNSEL FOR PLAINTIFFS/APPELLEES, KAISER ALUMINA & CHEMICAL CORPORATION/ AXA GLOBAL RISKS, ET AL.

LOUIS C. LACOUR, JR.
RAYMOND P. WARD
Adams and Reese LLP
4500 One Shell Square
701 Poydras Street
New Orleans, Louisiana 70139
ERNEST P. GIEGER, JR.
ANDREW A. BRAUN
Gieger, Laborde & Laperouse, LLC
4800 One Shell Square
New Orleans, Louisiana 70139
ROBERT E. WINN
SHARON CORMACK MIZE
Sessions, Fishman & Nathan, LLP
201 St. Charles Avenue, 35th Floor
New Orleans, Louisiana 70170-3500
COUNSEL FOR DEFENDANT/APPELLANT, THOMAS & BETTS CORP.

REVERSED; VERDICT REINSTATED

This is an appeal in an action comprising numerous consolidated cases from the Twenty-Third Judicial District Court, St. James Parish, arising out of a massive

industrial explosion at the Kaiser Aluminum plant in Gramercy on July 5, 1999. At issue on the appeal is the liability of one defendant, Thomas & Betts Corporation. We reverse the trial court's grant of judgment notwithstanding the verdict and reinstate the jury's verdict. We also reverse the trial court's grant of a conditional new trial.

PROCEDURAL HISTORY

Originally there were 71 lawsuits arising from the Kaiser explosion, most of which were consolidated.[1] The plaintiffs included not only persons directly injured in the plant, but also inhabitants of the surrounding area, as well as commercial entities and insurers seeking compensation for property damage and business losses, and/or indemnification for any liability to other claimants.[2]

By the time of trial, all of the cases had been settled and/or dismissed except three: a suit by Kaiser Aluminum & Chemical Corporation ("Kaiser") for its uninsured losses caused by the explosion;[3] a personal injury suit by Kaiser

---

[1] After consolidation the district court assigned the suits the master case name of *In re: Gramercy Plant Explosion at Kaiser.* When the case was lodged on appeal, pursuant to this Court's internal policy it was filed under the name of the first of the consolidated cases, *Carl Bell v. Kaiser Aluminum, et al.,* No. 04-CA-1151 (23rd Judicial District Court No. 25,975). For uniformity of designation in the matter, however, we are ordering that the master case name be adopted as the name of the matter on this Court's records. The order is being issued in conjunction with release of this opinion.

[2] Most of the personal injury claimants were part of a class action, but others opted out of the class action to pursue their individual suits.

[3] *Kaiser Aluminum v. Power & Control Systems, Inc, et al.,* No. 04-CA-1171 (23rd Judicial District Court No. 26,821).

employee Terrence Hayes ("Hayes");[4] and a suit by Kaiser's subrogated reinsurers – AXA Global Risks (U.K.), et al. (collectively "AXA") – for Kaiser's insured losses.[5]

The defendants in these suits included Power & Control Systems, Inc. and Power & Control Systems International, Inc. (collectively "PCS"), which designed the electrical system at the Kaiser plant; MEI Corporation, MEI Electrical, Inc., Merit Electrical & Instrumentation, Inc., and Merit Electrical, Inc. (collectively "MEI"), and Excel Group, Inc., formerly known as Excel Electrical & Instrumentation, Inc. (collectively "Excel"), electrical contractors that performed work at the plant; Thomas & Betts Corporation ("T&B"), manufacturer of adhesive mounts used to hold wiring in the plant; Adhesives Research, Inc. ("ARI"), manufacturer of the adhesive used in the adhesive mounts; Walter Hansley, a worker alleged to have been instrumentally negligent in events leading to the explosion; Manpower, Inc., Manpower International, Inc. (collectively "Manpower"), the employers of Hansley;

---

[4] *Terrence Hayes v. MEI Corporation, et al.*, No. 04-CA-1184 (23rd Judicial District Court No. 26,861).

[5] *AXA Global Risks (U.K.), et al. v. Thomas & Betts Corporation, et al.*, No. 04-CA-1187 (23rd Judicial District Court No. 26,865). The other reinsurers collectively included under the designation "AXA" are Allianz Insurance Company; Certain Underwriters at Lloyd's, London, individually subscribing to certain facultative reinsurance contracts issued to Trochus Insurance Company, Ltd., Compagnie Transcontinentale De Reassurance, Houston Casualty Company, Lexington Insurance Company, Munich Reinsurance Company, National Union Fire Insurance Company, Qatar General Insurance and Reinsurance Company, Q.B.E. International Insurance, Ltd., Sorema Insurance Company, Swiss Reinsurance Company, Winterthur International Insurance Company, and Zurich Reinsurance Company.

and Schweitzer Engineering Laboratories, Inc., manufacturer of an electrical relay used at the plant.

Kaiser and AXA (hereafter "Kaiser/AXA")[6] alleged that the explosion was caused by a power failure that began about a half-hour before the explosion and that the power failure was caused by concurrent fault of PCS, Schweitzer, MEI, Excel, T&B, and ARI. Kaiser/AXA contended the root cause of the power failure was improper installation of a handful of one-inch-square adhesive-backed cable-tie mounting bases (commonly referred to as "sticky-backs") inside high-voltage switchgear in an electrical building (Switch House 2) at the Kaiser plant.

Kaiser/AXA alleged the wiring ("CT leads") that was routed through the sticky-backs came into contact with a high-voltage bus bar when several sticky-backs came loose from the cabinet wall to which they were attached. Kaiser/AXA claimed the contact degraded the insulation on both the CT leads and the bus bar, eventually leading to a short-circuit (technically, a phase-to-ground fault). The fault caused a chain reaction, in which circuit breakers tripped on all three loop feeders supplying power to the plant, resulting in a power outage.

Kaiser/AXA alleged that PCS was negligent in failing to design the electrical system so that a fault in Switch House 2 would not take the entire electrical loop off-line and, further, that PCS was negligent in failing to program the computerized Schweitzer electrical relays properly. They alleged Excel was negligent for using sticky-backs

[6] Kaiser went through bankruptcy during the course of this suit, and the bankruptcy court allowed AXA to be subrogated to all Kaiser's claims. Hence, they are for practical purposes one party, "Kaiser/AXA."

inside high-voltage switchgear, where their coming loose could cause an electrical fault, and that T&B was liable for failure to warn Excel about the limitations inherent in the sticky-backs.

In response, T&B filed incidental actions against Kaiser and AXA, alleging that Kaiser destroyed, altered, concealed or denied T&B access to evidence bearing on the cause of the power failure.

The trial commenced on October 8, 2001 before a twelve-member jury, and continued over the course of 27 days.

Briefly, the evidence established that the explosion evolved following a power failure in Switch House 2, caused when electrical wiring that had been run along the side of a switchgear cabinet fell onto a piece of high-voltage bus bar, resulting in a phase-to-ground fault that interrupted power. Although Kaiser had a system that was supposed to isolate such power failures so that the whole plant would not be shut down, the system failed. Employees took actions intended to prevent overheating of the large towers (known as flash tanks) that process bauxite into alumina (a production phase in producing aluminum). However, the actions failed because some of the equipment was not operating properly. Within a short time the tanks overheated and exploded.

On November 19, 2001, the jury returned a verdict that absolved Schweitzer, T&B, and Hansley/Manpower of fault, but found that Kaiser, MEI, and PCS were at fault, their fault was a legal cause of the explosion, and apportioned their fault as follows: Kaiser, 75%; MEI, 5%; PCS, 20%. The jury awarded damages to Terrence Hayes in the amount of $20,307,000.00, but denied damages to his

daughter for loss of consortium, and denied damages to Kaiser, and to its insurers (AXA, et al.).

After the jury returned its verdict, Kaiser, AXA and Hayes filed motions for judgment notwithstanding the verdict (JNOV) and, alternatively, for new trial. The trial court granted JNOV in favor of Kaiser/AXA and against T&B, and also granted the motion for new trial conditionally, in the event the JNOV is reversed on appeal.

In the JNOV, the court found T&B to be 25% at fault, reduced Kaiser's allocation of fault to 60%, reduced the fault of PCS to 10%, and maintained the jury's fault allocation of 5% to MEI. The court also granted JNOV as to damages, awarding Kaiser/AXA combined damages of $335 million, $122 million less than the $457 million requested by Kaiser/AXA. Finally, the court provisionally granted Kaiser/AXA's motion for new trial, in the event the JNOV is be reversed on appeal, and ordered that the new trial be held in a different venue.

The JNOV maintained the jury's finding in favor of Hayes and also upheld the amount of the damage award to him.

ISSUES ON APPEAL

Originally both T&B and Hayes appealed; Hayes, however, dismissed his appeal and only the issues raised by T&B are before us.

On appeal T&B makes the following assignments of error:

1. The trial court usurped the jury's fact-finding function when it ignored substantial

record evidence supporting the jury's verdict, and granted Kaiser's and AXA's motion for judgment notwithstanding the verdict.

2. The trial court erroneously ordered a (conditional) new trial despite the absence of any prejudicial irregularity in the course of the trial.

3. The trial court's grant of a change of venue (in the event of a new trial) is unsupported by the record and is inconsistent with La.C.C.P. art. 122.

4. The trial court erred by failing to exclude damages to non-Kaiser entities from its award and by failing to reduce the award to account for depreciation and for operational betterments inherent in the rebuilt plant.

LAW AND ANALYSIS

JNOV

T&B contends the trial court committed legal error by granting a JNOV against T&B after the jury exonerated T&B.

The Louisiana Products Liability Law, the basis for liability of T&B, provides in pertinent part:

> A. A product is unreasonably dangerous because an adequate warning about the product has not been provided if, at the time the product left its manufacturer's control, the product possessed a characteristic that may cause damage and the manufacturer failed to use reasonable care to provide an adequate warning of such

> characteristic and its danger to users and handlers of the product.
>
> B. A manufacturer is not required to provide an adequate warning about his product when:
>
> * * *
>
> (2) The user or handler of the product already knows or reasonably should be expected to know of the characteristic of the product that may cause damage and the danger of such characteristic.

La.R.S. 9:2800.57.

In granting the JNOV, the trial court gave extensive written reasons within the judgment. He stated, first, the court had denied the plaintiffs' motion for a directed verdict against T&B at the close of trial because "the Court was of the opinion that it could be a jury question whether or not the power outage was a substantial cause in fact of the explosion."

> There was no question in the court's mind as to whether reasonable and fair minded men would find that Thomas & Betts had failed in its duty as set out under the LPLA by its complete failure to warn. The jury did find that the Thomas & Betts product failed in service, as is evident by their finding that the acts of Excel/MEI and PCS were legal causes of the accident and explosion. There is no other reasonable explanation for the attribution of fault to Excel/MEI and PCS. Having found that the power outage was cause [sic] by the failure of the Thomas & Betts product (the only work Excel/MEI performed that could be related in any way to the accident and

> explosion) this court believes the jury had to attribute fault to Thomas & Betts, whose product failed to satisfy the minimum requirements of products in Louisiana. As the jury failed to fulfill their responsibility to require this manufacturer to comply with its duty, this Court will rectify that problem . . .

Finding that the jury erred, the court held that "the facts, inferences and the LPLA standards . . . point so favorably to the conclusion that Thomas & Betts bears fault for this accident and that Kaiser/AXA suffered substantial damages, that reasonable men could not reach the decision made by the jury," and granted the motion for JNOV, listing these reasons:

> With respect to liability, the court finds that Kaiser, Thomas & Betts, Excel/MEI and PCS all bore fault for this event. The court finds that Kaiser bore the majority of the fault through the acts of its employees and through its failure to have its overpressure safety systems fully operational on the day of the accident, and assigns Kaiser 60% of the fault for the overall event. Thomas & Betts products were amply proven to be defective and not in compliance with the LPLA, and the power outage was acknowledged by the jury to be a causative factor in the overall event. I agree with the jury finding that the electrical outage was a substantial causative factor in the overall event. I assign the next highest responsibility for the overall accident to Thomas & Betts, to which I assign 25% fault. Thomas & Betts had specific knowledge with respect to suitability and use of their product which they withheld from the public. It is obvious that marking a product "for temporary use only" would reduce sales of that product. The court finds that

> Thomas & Betts made a choice to enhance its sales instead of properly warning the public about its product limitations, of which it was well aware. Excel/MEI, the electricians who installed the Thomas & Betts product, were found by the jury to have borne 5% of the fault for their use of the T&B product, which conclusion I will not disturb. PCS, the engineering overseers of Excel/MEI and programmer of the Schweitzer relays for Kaiser was found by the jury to bear 20% of the fault for this accident. As Thomas & Betts provided the engineering diagram to any of its customers who asked, which shows the intended use of the product to be identical to the manner in which Excel/MEI and PCS used it, I will reduce the fault of PCS to 10%. I concur with the jury, and do not find Schweitzer Engineering Labs to have borne any fault for this particular power outage or accident. I also concur with the jury and do not find Walter Hansley/Manpower to have borne any fault to this particular accident.

A motion for JNOV may be granted on the issue of liability or on the issue of damages or on both issues. La.C.C.P. art. 1811(F). The strict criteria for granting judgment notwithstanding the verdict (JNOV) is predicated on the rule that when there is a jury, the jury is the trier of fact. *Smith v. State, Dept. of Transp. & Development,* 04-1317, 2004-1594 (La. 3/11/05), 899 So.2d 516.

> [A] JNOV is warranted when the facts and inferences point so strongly and overwhelmingly in favor of one party that the trial court believes that reasonable persons could not arrive at a contrary verdict. The motion should be granted only when the evidence points so strongly in favor of the moving party that reasonable persons

> could not reach different conclusions, not merely when there is a preponderance of evidence for the mover. The motion should be denied if there is evidence opposed to the motion which is of such quality and weight that reasonable and fair-minded persons in the exercise of impartial judgment might reach different conclusions. In making this determination, the trial court should not evaluate the credibility of the witnesses, and all reasonable inferences or factual questions should be resolved in favor of the non-moving party.

Trunk v. Medical Center of Louisiana at New Orleans, 04-0181, p. 4 (La. 10/19/04), 885 So.2d 534, 537, citing *Joseph v. Broussard Rice Mill, Inc.,* 00-0628, pp. 4-5 (La. 10/30/00), 772 So.2d 94, 99; see also *VaSalle v. Wal-Mart Stores, Inc.,* 01-0462, p. 11 (La. 11/28/01), 801 So.2d 331, 338-39.

> In reviewing a JNOV, an appellate court must first determine whether the district judge erred in granting the JNOV by using the above-mentioned criteria in the same way as the district judge in deciding whether to grant the motion. Thus, the appellate court must determine whether the "facts and inferences point so strongly and overwhelmingly in favor of the moving party that reasonable persons could not arrive at a contrary verdict." If the appellate court determines that reasonable persons might reach a different conclusion, then the district judge erred in granting the motion and the jury verdict should be reinstated. [Citations omitted.]

Trunk, 04-0181 at p. 5, 885 So.2d at 537.

In ruling on a motion for a judgment notwithstanding the verdict (JNOV), the trial court should not evaluate the

credibility of the witnesses, and all reasonable inferences or factual questions should be resolved in favor of the non-moving party; this rigorous standard is based upon the principle that when there is a jury, the jury is the trier of fact. *Martin v. Heritage Manor South Nursing Home,* 00-1023 (La. 4/3/01), 784 So.2d 627.

T&B asserts a reasonable jury could find Excel negligent for failing to comply with Kaiser's general specifications governing Excel's work. T&B states there is ample basis for a reasonable jury to assign fault to Excel and PCS without assigning fault to T&B. For example, the jury could have decided Excel was negligent in failing to understand or follow Kaiser's general specifications for the job, which required the CT leads to be enclosed in flexible metal conduit. (It was uncontested that had conduit been used, the power failure would not have occurred.)

In addition, T&B argues, the jury could reasonably expect that Excel, a professional electrical contractor, already knew or should have known about the obvious limitations of a peel-and-stick wire mount and the inappropriateness of using such a product in a high-voltage cabinet.

Further, negligent programming of the Schweitzer relays by PCS escalated a fault in a single switch house into a plant-wide power failure.

Finally, T&B urges that the jury's reasonable allocation of fault mandates reversal of the JNOV. Specifically, T&B avers, the 25% fault assigned to the electricians (PCS & Excel) and the 75% fault allocation to Kaiser are reasonable allocations of fault.

With respect to T&B's liability, the evidence was that William Philyaw bought a package of T&B mounting bases, which he had used on numerous prior occasions. He used these adhesive-backed plastic bases to attach low-voltage electrical control wires to the wall in a switchgear cabinet at the Kaiser plant. Philyaw was an employee of electrical contractor Excel.[7]

By July 5, 1999, 13 months after they were installed, all of the T&B mounts in the switchgear cabinet had fallen off the wall and the wires they previously supported were loose and sagged against a high-voltage bus bar. The resulting phase-to-ground fault ultimately resulted in the explosions and catastrophic damage.

Philyaw said at trial he would not have used the T&B bases if T&B had supplied warnings that the bases were not intended for permanent installations. T&B points out, however, that Philyaw must have known that the sticky-backs might come loose over time, because he said he tried to route the wires so that if for some reason the wire came off the wall, it would not contact the bus bar.

Philyaw denied knowing the sticky-backs might loosen, but a reasonable jury could find his actions indicated otherwise. Philyaw admitted he had seen a few sticky backs come off walls before.

There was also testimony that Kaiser's engineer, Ken Scannapiego, knew that sticky-backs may detach from the surface, and that Kaiser's electrical maintenance

---

[7] Excel is also referred to as "Excel/MEI" because it either merged with or was bought by MEI.

superintendent, John Scavona, would not have used the product in a high voltage application.

It is the jury's prerogative to assess witness credibility. In ruling on a motion for JNOV, the trial court may not evaluate credibility, and all reasonable inferences or factual questions should be resolved in favor of the non-moving party. *Joseph v. Broussard Rice Mill, Inc.*, 00-628, p. 5, 772 So.2d at 99.

The issue for the trial court was whether the facts and inferences point so strongly and overwhelmingly in favor of one party that reasonable persons could not arrive at a contrary verdict. Despite the trial court's statement, we conclude that reasonable persons could arrive at a contrary verdict, as this jury did.

The jury was allowed to view and handle sticky-backs during the trial. In looking at them, the jury could decide for themselves whether the limitations of the product – a one-inch square piece of plastic, with three channels on the top surface and an adhesive-backed foam pad on the back surface – should have been obvious to Excel and its employee, Philyaw, as well as to Kaiser, which inspected the work done by its electrical contractors.

It is reasonable for the jury to decide that a person – in particular, a professional wiring installer – should perceive the obvious limitations of the item. Further, it is reasonable for the jury to decide that Philyaw's actions demonstrated awareness of the risk.

Further, regarding the argument that T&B's failure to include a warning about temporary use versus permanent use violated the LPLA, the adequacy of any particular warning is a question for the jury. *Reilly v. Dynamic*

Exploration, Inc., 571 So.2d 140, 145 (La. 1990). The testimony by the Kaiser/AXA expert, Jerry Householder, and T&B's expert, Jerry Purswell, directly conflicted. Purswell compared the sticky-back to a nail – another simple fastening device that can be used in temporary or permanent settings, and which generally comes with no warnings. It was the jury's province to decide which witness's testimony to credit. A reasonable jury could have decided that a sticky-back, like a nail, does not need the kinds of warnings that Kaiser/AXA argues for.

Additional questions for the jury decision were proximate cause and allocation of fault. La.R.S. 9:2800.54 provides,

> A. The manufacturer of a product shall be liable to a claimant for damage proximately caused by a characteristic of the product that renders the product unreasonably dangerous when such damage arose from a reasonably anticipated use of the product by the claimant or another person or entity.
>
> B. A product is unreasonably dangerous if and only if:
>
> * * *
>
> (3) The product is unreasonably dangerous because an adequate warning about the product has not been provided as provided in R.S. 9:2800.57. . . .

When there are concurrent causes of an accident, the proper inquiry is whether the conduct in question was a substantial factor in bringing about the accident. Whether the defendant's conduct was a substantial factor in bringing about the harm, and, thus, a cause-in-fact of the

injuries, is a factual question to be determined by the factfinder. *Theriot v. Lasseigne,* 93-2661, p. 5 (La. 7/5/94), 640 So.2d 1305, 1310.

The jury here may reasonably have allocated fault according to the parties' control over, or the role played by, the instrumentalities that caused the explosion. Kaiser (assigned 75% fault by the jury) controlled the entire plant, including the electrical system, the vessels that exploded, and the non-functioning pressure-relief systems that directly caused the explosion.

PCS (assigned 20% fault by the jury) erroneously programmed the Schweitzer relays, which was a direct cause of the plant-wide power failure. However, PCS's failure was an indirect, less proximate cause of the explosion compared to Kaiser's misconduct.

The jury allocated only 5% fault to Excel, and reasonably may have found that Excel's wiring in the switch house was an indirect cause of the power failure and that intervening, independent negligence by PCS was required to turn the electrical fault in Switch House 2 into a large-scale power failure, and that much greater intervening negligence by Kaiser was required to turn the power failure into an explosion.

Unlike Excel, T&B could not have known the risk created by the proximity between the CT leads and the high-voltage bus bars. Further, since Philyaw testified he never saw any of the warnings or instructions accompanying the stick-backs [sic], the jury could reasonably find that any alleged deficiency in the warnings or instructions was not a proximate cause of any of the events.

Even when a plaintiff proves that the lack of an adequate warning or instruction rendered a product unreasonably dangerous, a presumption arises that the user would have read and heeded such admonitions. *Bloxom v. Bloxom,* 512 So.2d 839, 850 (La. 1987). The presumption, may, however, be rebutted if the manufacturer produces contrary evidence which persuades the trier of fact that an adequate warning or instruction would have been futile under the circumstances. *Id.*

Considering all the above factors, we conclude that "reasonable and fair-minded persons in the exercise of impartial judgment might reach different conclusions." *Trunk,* 04-181, p. 4, 885 So.2d at 537. Accordingly, we find the trial court erred in granting the motion for judgment notwithstanding the verdict.

New Trial

In granting the conditional motion for new trial, the trial court included the following written reasons within the judgment:

> I have the right to grant a new trial under purely discretionary grounds under CCP art. 1973, which I would do if I did not grant the JNOV, or would do in the alternative. In retrospect, there were multiple occasions during the six weeks of trial when it may have been appropriate to grant some of the Mōtions for Mistrial that were orally argued. Virtually all of the lawyers made mistakes at one point or another during this over six-week trial.
>
> * * *

> If the JNOV is overturned by the Court of Appeal, fundamental fairness, the difficulty in picking a jury that does not have pre-conceived ideas about Kaiser, and the errors and irregularities that occurred during this lengthy trial mandate a new trial.
>
> I note that CCP art. 1813(E) also provides a potential basis for a new trial, as the special verdict form as completed by the jury contained irreconcilable answers.
>
> I have the right to grant a new trial if the judgment is contrary to law and/or to evidence under CCP art. 1972. I would do so under this article as well. Some of the reasoning for granting a new trial under CCP art. 1972 is outlined by the reasons in support of the JNOV, and the other reasoning outlined above.

T&B contends the trial court erred by granting plaintiffs' alternative motion for a new trial in a new forum, because the jury's fair interpretation of the evidence precludes new trial under La.C.C.P. art. 1972(1) and new trial pursuant to La.C.C.P. art. 1973 is not warranted because the verdict is not a miscarriage of justice. Further, T&B asserts, there is no basis for a change of venue.

A party may join a motion for new trial with a motion for judgment notwithstanding the verdict, or may pray for a new trial in the alternative. La.C.C.P. art. 1811(A)(2). If the court grants the motion for judgment notwithstanding the verdict, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed and shall specify the grounds for granting or denying the motion for a new trial. La.C.C.P. art. 1811(C)(1). If the

motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court orders otherwise. La.C.C.P. art. 1811(C)(2).

A motion for a new trial requires a less stringent test than for a judgment notwithstanding the verdict (JNOV), as such a determination involves only a new trial and does not deprive the parties of their right to have all disputed issues resolved by a jury. *Davis v. Wal-Mart Stores, Inc.*, 00-0445 (La. 11/28/00), 774 So.2d 84.

A conditional grant of a new trial is not to be used to give the losing party a second bite at the apple without facts supporting a miscarriage of justice that would otherwise occur. *Joseph v. Broussard Rice Mill, Inc.*, 00-0628 (La. 10/30/00), 772 So.2d 94.

In several recent cases, our supreme court has ruled that when a JNOV is reversed on determination that the jury's verdict was reasonable in light of the evidence presented, the conditional new trial also should be reversed.[8] We find that reasoning applicable here, and conclude the trial court abused its discretion in granting the conditional new trial.

---

[8] *Trunk*, 04-181, p. 11, 885 So.2d at 540 ("Because we have previously concluded that the jury's verdict was reasonable in light of the evidence presented, we find that plaintiff is not entitled to a new trial."); *see also, VaSalle*, 01-462, p. 18, 801 So.2d at 342; *Davis v. Witt*, 02-3102, p. 23, 851 So.2d at 1134 ("When any fair interpretation of the evidence supports the jury's verdict, the grant of a new trial must be reversed.").

Since we have determined the trial court erred in granting the conditional new trial, the issue of change of venue is moot. Accordingly, we need not address it.

DAMAGES

Our reversal of the JNOV also eliminates the trial court's award of damages to Kaiser; hence, we need not address T&B's assignment of error on this issue.

DECREE

For the foregoing reasons, the judgment of the district court is reversed and the jury verdict is reinstated. Costs of this appeal are assessed to the appellees, Kaiser and AXA.

REVERSED; VERDICT REINSTATED.

APPENDIX F

The Supreme Court of the State of Louisiana

IN RE: GRAMERCY PLANT EXPLOSION AT KAISER.

No. 2006-CC-2141

IN RE: Hayes, Terrence; – Plaintiff; Applying for Supervisory and/or Remedial Writs, Parish of St. James, 23rd Judicial District Court Div. D, Nos. 25,975; to the Court of Appeal, Fifth Circuit, No. 06-C-555.

October 6, 2006

Denied.

JLW
PFC
CDK
BJJ
JPV
CDT
JTK

Supreme Court of Louisiana
October 6, 2006

/s/ Carmen B. Young
Deputy Clerk of Court
For the Court

APPENDIX G

TWENTY-THIRD JUDICIAL DISTRICT COURT
PARISH OF ST. JAMES
STATE OF LOUISIANA

In re: Gramercy Plant Explosion at Kaiser

Master Docket No. 25,975 Division D
Applies to No. 26,861

Filed: July 28, 2006 /s/ Jan Donaldson
Deputy Clerk of Court

Thomas & Betts's Notice of Intent to Seek Supervisory Writ, Request for Return Date, and Motion for Stay

Thomas & Betts Corp. ("T&B") intends to apply to the Court of Appeal, Fifth Circuit, State of Louisiana, for a supervisory writ to review this Court's judgment of July 20, 2006 on plaintiff Terrence Hayes's motion to enforce judgment. T&B requests that the Court set a reasonable return date by which T&B is to file its writ application. Finally, T&B further moves this Court to stay its judgment of July 20, 2006, pending the Court of Appeal's disposition of T&B's application for supervisory writ.

/s/ Louis C. LaCour
Louis C. LaCour, Jr., # 14102
Raymond P. Ward, # 20404
ADAMS AND REESE LLP
4500 One Shell Square
701 Poydras Street
New Orleans, LA 70139
Tel: (504) 581-3234
Fax: (504) 566-0210

Ernest P. Gieger, Jr., # 6154
Andrew A. Braun, # 3415
GIEGER, LABORDE & LAPEROUSE, LLC
4800 One Shell Square
701 Poydras Street
New Orleans, LA 70139
Tel: (504) 561-0400
Fax: (504) 561-1011

Robert E. Winn, # 11136
Sharon Cormack Mize, # 17716
SESSIONS, FISHMAN & NATHAN, LLP
201 St. Charles Ave., 35th Floor
New Orleans, LA 70170-3500
Tel: (504) 582-1500
Fax: (504) 582-1555

Counsel for Thomas & Betts Corp.

Certificate of Service

I certify that on July 26, 2006, a copy of this paper was mailed, faxed, or hand-delivered to:

Judge Pegram J. Mire, Jr.
4809 Hwy. One
Napoleonville, LA 70390
(225) 473-8714

Walter C. Dumas
Dumas & Associates Law Corp.
P.O. Box 1366
Baton Rouge, Louisiana, 70821-1366
Tel: (225) 383-4701
Fax: (225) 383-4719

/s/ Louis C. LaCour

APPENDIX H

COURT OF APPEAL
FIFTH CIRCUIT
STATE OF LOUISIANA

No. ___

IN RE: GRAMERCY PLANT EXPLOSION AT KAISER

On Application for Supervisory Writ
to the 23rd Judicial District Court,
Parish of St. James
Hon. Pegram J. Mire, Judge

Thomas & Betts Corp.'s
Application for Supervisory Writ

Request for Expedited Consideration
Request for Stay Order

Louis C. LaCour, Jr.,
14102,
Appeal Counsel
Raymond P. Ward, # 20404
ADAMS AND REESE LLP
4500 One Shell Square
New Orleans, LA 70139
Tel: (504) 585-0328
Fax: (504) 566-0210
Email:
louis.lacour@arlaw.com

Ernest P. Gieger, Jr., # 6154
Andrew A. Braun, # 3415
GIEGER, LABORDE &
LAPEROUSE, LLC
4800 One Shell Square
New Orleans, LA 70139
Tel: (504) 561-0400
Fax: (504) 561-1011

Robert E. Winn, # 11136
Sharon Cormack Mize, # 17716
SESSIONS, FISHMAN & NATHAN, LLP
201 St. Charles Ave. 35th Floor
New Orleans, LA 70170-3500
Tel: (504) 582-1500
Fax: (504) 582-1555

Counsel for Applicant, Thomas and Betts Corp.

Index

Affidavit of Verification and Service 2

Request for Expedited Consideration 3

Jurisdictional Statement 4

Statement of the Case 4

Issue Presented 7

Assignment of Error 7

Argument 7

1. The trial court judgment is contrary to this Court's judgment 8

2. Request for sanctions 12

Conclusion 14

Appendix

Exh. 1: Trial Court's Judgment of July 20, 2006

Exh. 2: T&B's notice of intent to seek supervisory writ

Exh. 3: Trial court's order setting return date for writ application

Exh. 4: Trial court's judgment granting JNOV

Exh. 5: Motion and order of suspensive appeal

Exh. 6: Hayes's original appellate brief, Appeal No. 04-C-1151 through 04-C-1191

Exh. 7: Hayes's motion to enlarge time for oral argument in Appeal No. 04-CA-1151 through 04-CA-1191

Exh. 8: This Court's March 28, 2006 in Appeal No. 04-CA-1151 through 04-CA-1191

Exh. 9: Louisiana Supreme Court's writ denial of June 14, 2006

Exh. 10: Hayes's motion to enforce judgment (minus attached exhibits)

Exh. 11: This Court's July 7, 2006 writ denial, No. 06-C-453.

Affidavit of Verification and Service

State of Louisiana

Parish of Orleans

Before me, Notary, personally came and appeared **Louis C. LaCour Jr.**, who, after being sworn by me, Notary, stated that the allegations in this writ application are true, and that a copy of this application has been served on the following persons by means equally prompt as that used for filing:

Walter C. Dumas, #5163
Patti Durio Hatch #22719
Dumas & Associates Law Corp.
The Lawyer's Complex
1263 Government Street
P.O. Box 1366
Baton Rouge, Louisiana, 70821-1366
(225) 383-4701

-and-

Hon. Pegram J. Mire, Jr.
Judge, 23rd Judicial District Court
114 Nichols Avenue
Donaldsonville, Louisiana 70346
(225) 473-8714

/s/ Louis C. LaCour, Jr.
Louis C. LaCour, Jr.

/s/ Donald C. Massey
Notary Public

Donald C. Massey
NOTARY PUBLIC
Notary #4103
La Bar #14177
My Commission Expires at Death

Request for Expedited Consideration and Request for Stay Order

On March 28, 2006, this Court reversed an $88.75 million JNOV against applicant, Thomas & Betts Corp. ("T&B"), and reinstated a defense verdict in T&B's favor. *In re Gramercy Plant Explosion at Kaiser*, 04-1151 c/w and through 04-1191 (La. App. 5 Cir. 3/28/06), 927 So. 2d 492, *writ denied*, 2006-1003 (La. 6/14/06).[1] Despite the reversal of the JNOV, the trial court has rendered a judgment purporting to allow one of the plaintiff – appellees, Terrence Hayes, to execute his $5 million portion of the JNOV against T&B.[2] Besides lacking any legal justification, the trial court's judgment threatens irreparable injury and disruption to T&B's business operations. T&B requests that the Court give this application expedited consideration, or that the Court immediately stay the trial court's judgment pending this Court's consideration of T&B's application.

Jurisdictional Statement

Applicant, Thomas & Betts Corp., invokes this Court's supervisory jurisdiction under La. C.C.P. Art. 2201 and

---

[1] Exh. 8 *infra*.

[2] Exh. 1 *infra*.

Rule 4, Unif. Rules of La. Cts. of Appeal. This writ application is timely under Rule 4-3. The judgment complained of was rendered on July 20, 2006.[3] T&B gave notice of its intent to seek a supervisory writ on July 26, 2006.[4]

Despite every effort by counsel to obtain a signed order setting a return day, it was not possible to do so in sufficient time to present with this application. Though contact was made with the trial judge's office in order to arrange for execution of the order, and despite being told to travel to the judge's office to do so, when the courier arrived with the notice and order he was advised that the judge had left for the day and would be otherwise unreachable. When the executed order is received, it will be immediately filed with this Court.

Given the urgency of this application, and its filing only two days after notice of the judgment, applicant believes that it has complied with the spirit, if not the letter, of the rule requiring attachment of the return-day order.

Statement of the Case

On July 5, 1999, one or more explosions occurred at the Kaiser plant in Gramercy, La. The incident generated scores of lawsuits, most of which were consolidated in the 23rd JDC, St. James Parish. Among the many lawsuits were those by Kaiser Aluminum & Chemical Corp., AXA Global Risks et al. (Kaiser's reinsurers), and Terrence

---

[3] Exh. 1 *infra*.

[4] Exh. 2 (notice of intent) and Exh. 3 (order setting return date), *infra*.

Hayes. Thomas & Betts Corp. (T&B) was one of numerous defendants named in many of those lawsuits. In the fall of 2001, a six-week jury trial was held in the district court. Before and during trial, many claims settled. By the time the jury delivered its verdict, the few claims remaining included those of Kaiser, AXA, Hayes, and the class-action representatives against T&B and another defendant. The jury exonerated T&B, assigning 75% fault to Kaiser, 25% fault to defendants who had settled, and 0% fault to T&B.

Kaiser, AXA, Hayes, and the class moved for JNOV and a conditional new trial. The district court rendered a single judgment granting both JNOV and conditional new trial to the various movers.[5]

T&B appealed that judgment, seeking reversal of both the JNOV and conditional new trial.[6] While the case was on the appeal, the class-action aspect was settled, leaving Kaiser, AXA, and Hayes as the only appellees.

As an appellee, Hayes participated fully in the appellate proceedings. He was served with T&B's original brief, after which he filed his own brief, addressing both the JNOV and new-trial issues.[7] In the days leading up to oral argument, he signed a motion seeking to enlarge the time for oral argument in this Court.[8] After this Court denied the motion, he negotiated with Kaiser – AXA's counsel to split the argument time allotted to appellees. When the day of oral argument arrived, he sat at counsel table, took

---

[5] Exh. 4 *infra*.

[6] Exh. 5 *infra*.

[7] Exh. 6 *infra*.

[8] Exh. 7 *infra*.

a portion of the appellees' argument time, and delivered oral argument to the three-judge panel. In short, he participated in every aspect of the appellate proceedings leading up to this Court's judgment.

On March 28, 2006, this Court reversed the district court's judgment and reinstated the jury verdict exonerating T&B. Although the Court taxed costs to Kaiser – AXA alone, its decree was unrestricted to any appellee:

> **DECREE**
>
> For the foregoing reasons, the judgment of the district court is reversed and the jury verdict is reinstated. Costs of this appeal are assessed to the appellees, Kaiser and AXA.
>
> **REVERSED; VERDICT REINSTATED**[9]

The cover page of this Court's decision lists Hayes as the first appellee.[10] Hence, this Court undoubtedly considered Hayes a party affected by its judgment.

This Court's March 28 judgment is now final. Hayes elected not to apply to the Louisiana Supreme Court for writs. Kaiser and AXA applied for writs, but their writ application was denied.[11]

Despite the unqualified, unambiguous language of this Court's decree and Hayes's full participation in the appellate proceedings leading to that decree, Hayes now takes the position that he was not a party to the appeal

---

[9] Exh. 8 p. 17 *infra*.

[10] *Id.* p. 1.

[11] Exh. 9 *infra*.

after all, and that therefore, this Court's decree does not apply to him.[12] He filed a motion in the district court to enter a "judgment" purporting to enforce the reversed JNOV.[13] Before the hearing of Hayes's motion, T&B applied to this Court for a writ of prohibition, seeking to prevent the trial court from hearing Hayes's motion. Although this Court denied that writ application as premature (because the trial court had not yet decided the issue), this Court invited T&B to apply for supervisory review following the trial court's decision.[14]

On July 10, 2006, the trial court held a hearing of Hayes's motion, and took the matter under advisement. On July 20, the trial court granted Hayes's motion.[15]

Issue Presented

Did the March 28, 2006 decision of this Court adjudicate the claims of Terrence Hayes against Thomas & Betts?

Assignment of Error

The district court erred by granting a motion to enforce a JNOV in Hayes's favor after this Court reversed the JNOV and reinstated the jury verdict exonerating T&B.

---

[12] Exh. 10 *infra*.

[13] Exh. 1 *infra*.

[14] Exh. 11 *infra*.

[15] Exh. 1 *infra*.

Argument

On March 28, 2006 this Court issued its decision in the matter entitled *In re Gramercy Plant Explosion at Kaiser*, 04-1151 (La. App. 5 Cir. 3/28/06), 927 So. 2d 492, *writ denied*, 2006-1003 (La. 6/14/06). In that decision, this Court reversed the trial court's grant of JNOV and reinstated the original jury verdict exonerating T&B.

One of the appellees in the appeal was Terrence Hayes, represented by Mr. Walter Dumas. As the court will note from the record in the prior appeal and recall from its own observation, Mr. Dumas – on behalf of Mr. Hayes – fully participated in the appeal, and shared oral argument with counsel for Kaiser/AXA. He did so because he knew his client's interests were at stake as one of the beneficiaries of the trial court's JNOV against T&B. Now, with the appeal having resulted in reinstatement of the defense verdict, he contends that the judgment on appeal does not apply to him – despite his full participation in the proceedings before this Court during the appeal.

As described more fully below, there is no legitimate question that *all* plaintiffs' claims against T&B, including Hayes's, were resolved in T&B's favor by this Court. Yet, choosing to ignore this simple truth, Hayes has obtained from the trial court a judgment purporting to "enforce" a non-existent JNOV in his favor, in patent disregard of this Court's decision.

1. The trial court's judgment is contrary to this Court's March 28 judgment.

Parties appeal judgments, not motions for judgment. There was one judgment by the 23rd JDC granting JNOV and new trial to various parties. T&B appealed that one

judgment in its entirety. And this Court reversed that same judgment in its entirety. Although the Court's taxation of costs is restricted to Kaiser and AXA, its decree reversing the 23rd JDC judgment and reinstating the jury verdict is not similarly restricted:

> For the foregoing reasons, the judgment of the district court is reversed and the jury verdict is reinstated. Costs of this appeal are assessed to the appellees, Kaiser and AXA.
>
> **REVERSED; VERDICT REINSTATED**

Nowhere in its judgment does this Court affirm anything in Hayes's favor.

In an attempt to escape this Court's plain, unambiguous decree, Hayes resorts to picking apart T&B's appellate brief. His chief argument is that the assignment of errors in T&B's original brief did not name him as one of the parties who moved the 23rd JDC for JNOV.[16] The trial

---

[16] There is good reason why T&B's assignment of errors referred to "Kaiser's and Axa's motion for [JNOV]" and not Hayes's. Hayes's motion for JNOV, just one page long (not counting signature block), was a simple adoption of Kaiser's and AXA's motions. His entire argument for JNOV was as follows:

> Plaintiff, Terrence Hayes, . . . adopt[s] by reference the supporting memorandum of Kaiser, . . . and AXA Global Risks et al. . . . The evidence presented at trial supports the instant motion inasmuch as the verdict is completely inconsistent with the evidence.

85 R. 22547. Thus, the arguments accepted by the trial court in granting JNOV were not advanced by Hayes, but by Kaiser – AXA. T&B had this in mind when it wrote its appellate brief, hence the references to Kaiser – AXA's motion. This Court must have had the same thing in mind when it wrote its opinion; after all, the appellate record before this Court included Hayes's one-sentence adoption of Kaiser – AXA's JNOV papers. This Court knew, as T&B knew, that the

(Continued on following page)

court accepted this assignment-of-errors argument as justification for disregarding this Court's decree.

Any issue that might have been raised over T&B's assignment of errors is moot. This Court has decided the case, and its decree is what counts now. That decree reverses the 23rd JDC judgment in its entirety, without restriction to any appellee. If Hayes believed the decree to be overbroad in light of the assignment of errors, then he should have applied to this Court for rehearing, or applied to the Supreme Court for writs. He did neither. His attempt to raise an issue over T&B's assignment of errors comes too late, because this Court's judgment is now final.

Even if Hayes's argument about the assignment of errors had been made timely in a proper court, it would have no merit. An assignment of errors is not necessary in a civil appeal. La. C.C.P. Art. 2129. And regardless of how a party phrases its assignment of errors, the appellate court retains the power to render any judgment that is just, legal, and proper upon the record on appeal. La. C.C.P. Art. 2164.

Consistent with these Code articles, the Louisiana Supreme Court has repeatedly held that a Louisiana appellate court can decide any issue necessary to reach a just result, even if the issue is excluded from the assignment of errors. In *Georgia Gulf Corp. v. Board of Ethics for Public Employees*, 96-1907 (La. 5/9/97), 694 So. 2d 173, 175-76, the Court held that due-process issues could be considered at the appellate level even though the issues were not assigned as error. And in *Nicholas v. Allstate Ins.*

---

parties carrying the ball on the JNOV motion were Kaiser and AXA, and that the issues and arguments were identical.

Co., 99-2522 pp. 6-8 (La. 8/31/00), 765 So. 2d 1017, 1022-23, the Court held that the adequacy of certain jury instructions could be decided on appeal, even though not assigned as error. Although these controlling authorities were cited below, they are not mentioned in Hayes's filings or in the trial court's judgment.

Also absent from the trial court's judgment is the Louisiana decision most closely on point: *Greenfield v. Lykes Bros. Steamship Co.*, 02-1377 p. 4 n. 2 (La. App. 1 Cir. 5/9/03), 848 So. 2d 30, 32 n. 2. In *Greenfield*, a plaintiff appealed a judgment on an exception of prescription in favor of six defendants. But in his assignment of errors, he referred to only one of the six. Nevertheless, the Court of Appeal rendered judgment of reversal as to all six defendants. *Id.* p. 9, 848 So. 2d at 34. In the Court of Appeal's mind, Articles 2129 and 2164 and the Supreme Court's Nicholas decision rendered any omission of other defendants from the assignment of errors inconsequential:

> While all four assignments of error relate to "defendant, Westinghouse," it is apparent from the argument in brief that Mr. Greenfield is also challenging the efficacy of the judgment as to the other five named defendants on the same grounds that he is challenging the judgment rendered in favor of Viacom, Inc. [Westinghouse's successor]. In considering Mr. Greenfield's arguments in these regards, we note that La. C.C.P. art. 2129 states that assignments of error are not necessary in any appeal. Under La. C.C.P. art. 2129 and 2164, together with Uniform Rules of Louisiana Court of Appeal, Rule 1-3, we have clear authority to consider the matters before us even though there are no specific assignments of error regarding the judgment in favor of these defendants/appellees. *See Nicholas v. Allstate*

Insurance Co., 99-2522, pp. 7-8 (La. 8/31/00), 765 So. 2d 1017, 1022-23.

Id. p. 4 n. 2, 848 So. 2d at 32 n. 2. The Court of Appeal further noted that the other defendants – appellees were served with the appellant's brief and responded with their own appellees' briefs in which they generally adopted and supported Westinghouse/Viacom's arguments. *Id.*

The same principles apply here. Here, as in *Greenfield*, there was one judgment appealed that was in favor of several parties. Despite the phrasing of the assignment of errors, this Court understood that the appellant, T&B, was challenging the appealed judgment as to all appellees. And the grounds for reversal as to one appellee applied equally to the others.

The similarities do not end there. The conduct of Hayes in this case was the same as the conduct of the appellees in *Greenfield*. Like the appellees in *Greenfield*, Hayes's counsel was served with T&B's original appellate brief – the one with the assignment of errors he quoted in his motion and memorandum. After receiving that brief with T&B's assignment of errors, he continued his full participation in the case as an appellee. He filed an appellee's brief, responding to T&B's arguments on both JNOV and new trial.[17] He joined appellees' motion to enlarge the time for oral argument, describing himself in that motion as one of the appellees.[18] When that motion was denied, he negotiated with Kaiser – AXA's counsel to split the appellees' oral-argument time, and appeared personally before this Court to deliver oral argument. He did all these

[17] Exh. 6, *infra*.

[18] Exh. 7, *infra*.

things *after* reading T&B's brief with its assignment of errors.

The *Greenfield* case was cited below, and the similarities between its facts and those here were discussed at length in T&B's trial-court brief. Yet neither Hayes nor the trial court has mentioned *Greenfield* or attempted to distinguish it.

The only authorities offered by the trial court to support its grant of the motion are *Shear v. Shear*, 96-0934 (La. App. 5th Cir. 5/28/97), 695 So. 2d 1026, and *McGowan v. Ramey*, 484 So. 2d 785 (La. App. 1st Cir. 1986). But neither case supports the proposition that an appellate decree, reversing the entirety of the appealed judgment, is limited by the manner in which the issues were presented to the appeals court. Rather, this court's decision in *Shear* simply held that the Court could not consider a prescription issue because there was no judgment on that point in the trial court. And in *McGowan*, the court was unable to consider the appeal because no error whatsoever was assigned.

Hayes's conduct before this Court proves that his counsel understood two facts: (1) Hayes was included in T&B's appeal; and (2) the Court of Appeal's judgment would affect Hayes. Having participated fully in the appellate proceedings leading to the Court's judgment, Hayes cannot genuinely claim to be unaffected by that judgment.

2. Request for sanctions.

A lawyer who signs a pleading certifies that the pleading is well grounded in fact, is warranted by existing

law or a good-faith argument for change in existing law, and is not interposed for any improper purpose such as harassment. *See* La. C.C.P. Art. 863(B). When a lawyer signs a pleading in violation of this provision, "the court shall impose upon" the lawyer or the lawyer's client, or both, "an appropriate sanction which may include an order to pay the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, including a reasonable attorney's fee." La. C.C.P. Art. 863(D).

Here, Hayes's counsel has signed a pleading that is not well grounded in fact, that disregards the applicable Code of Civil Procedure articles and decisions of the Louisiana Supreme Court, and that cannot possibly have been filed for any proper purpose.

A. Not grounded in fact.

This Court's decree unambiguously reversed the JNOV in its entirety, without restriction to any appellee. Hayes's motion, seeking to execute a judgment that has been reversed, flouts this Court's judgment. This alone makes the signing of Hayes's motion sanctionable.

Moreover, the words in Hayes's pleading are belied by the actions of his counsel before this Court. As stated above, after being served with and reading T&B's original brief with its assignment of errors, Hayes's counsel continued his full participation in the appellate proceedings, thus tacitly conceding that he had a stake in the appeal.

B. Not warranted by law.

Hayes's motion violates multiple controlling legal authorities. By attempting to limit this Court's judgment through parsing of T&B's assignment of errors, his motion violates La. C.C.P. Art. 2129 and the Louisiana Supreme Court's decisions in *Georgia Gulf* and *Nicholas*, cited above. Moreover, he disregards *Greenfield*, the Louisiana decision most closely on point. These authorities have been cited in two prior filings in opposition to Hayes's motion: an opposition memorandum in the trial court and a prior writ application in this Court. Yet to date, Hayes has failed to distinguish any of these controlling authorities; instead, he has ignored them. The trial court's failure to mention these controlling authorities in its judgment does not excuse Hayes's counsel from the responsibility to address them.

C. Interposed to harass T&B.

No legitimate purpose is served by Hayes's pleading. His position has no merit, procedurally or substantively. Even if his position had merit, the proper places to seek relief would have been with this Court (on rehearing) or the Louisiana Supreme Court (on writs). The only purpose served by his pleading is an improper one: to harass T&B.

In short, counsel's signature on Hayes's pleading is sanctionable under Article 863, on multiple grounds.

Conclusion

This Court's March 28 judgment begins and ends with these words (underlining, bold print, and capitalization by this Court):

REVERSED; VERDICT REINSTATED

The judgment under which Mr. Hayes claims recovery – the district court's JNOV – no longer exists. The original jury verdict has been made the judgment of the Court, and that verdict wholly exonerates T&B of any liability to *any* party, including Hayes.

The active involvement of Hayes's counsel in the appellate proceedings – most of which occurred *after* he was served with T&B's original brief – shows his clear understanding that Hayes's rights would be adjudicated by this Court. His current position is contrary to his prior actions before this Court. His position and the trial court's judgment are contrary to the plain language of this Court's decree.

In its March 28 judgment, this Court held that the jury had a reasonable basis for finding T&B blameless.[19] This holding, now final, is the law of the case, and renders judgment dismissing Hayes's claims against T&B entirely "just, legal, and proper upon the record on appeal." La. C.C.P. Art. 2164. T&B is entitled to the benefits of the jury's verdict and this Court's March 28 judgment.

For all these reasons, T&B asks that this Court grant a supervisory writ, to reverse the judgment below, and to state unequivocally (again) that its March 28 judgment

---

[19] Exh. 8 pp. 12-15 *infra*.

applies to Hayes's claim. T&B further prays that appropriate sanctions be levied against Hayes's counsel.

Respectfully submitted,

ADAMS AND REESE LLP

/s/ Louis C. LaCour
Louis C. LaCour, Jr. #14102
Raymond C. Ward, #20404
4500 One Shell Square
New Orleans, Louisiana 70139
Tel. (504) 585-0328
Fax: (504) 553-9482
Email: louis.lacour@arlaw.com

Counsel for Petitioner,
Thomas and Betts Corp.

COURT OF APPEAL
FIFTH CIRCUIT
STATE OF LOUISIANA

No. 06-C-555

IN RE: GRAMERCY PLANT EXPLOSION AT KAISER

On Application for Supervisory Writ
to the 23rd Judicial District Court,
Parish of St. James
Hon. Pegram J. Mire, Judge

Thomas & Betts Corp.'s Supplemental Brief in Support of Application for Supervisory Writ

---

Request for Expedited Consideration
Request for Stay Order

Louis C. LaCour, Jr., # 14102,
Appeal Counsel
Raymond P. Ward, # 20404
ADAMS AND REESE LLP
4500 One Shell Square
New Orleans, LA 70139
Tel: (504) 585-0328
Fax: (504) 566-0210
Email:
louis.lacour@arlaw.com

Ernest P. Gieger, Jr., # 6154
Andrew A. Braun, # 3415
GIEGER, LABORDE &
LAPEROUSE, LLC
4800 One Shell Square
New Orleans, LA 70139
Tel: (504) 561-0400
Fax: (504) 561-1011

Robert E. Winn, # 11136
Sharon Cormack Mize, # 17716
SESSIONS, FISHMAN &
NATHAN, LLP
201 St. Charles Ave. 35th Floor
New Orleans, LA 70170-3500
Tel: (504) 582-1500
Fax: (504) 582-1555

Counsel for Applicant, Thomas and Betts Corp.

MAY IT PLEASE THE COURT:

Thomas and Betts Corp. submits this supplemental brief to respond to the Court's request that T&B file an executed order setting forth a return day, as required by La.C.C.P. art. 2201 and Rule 4-3, Uniform Rules – Courts of Appeal.

As noted in its initial papers, counsel attempted to procure the return-day order from the district court judge prior to the filing of the writ application on July 26, 2006. Based on an inquiry on the morning of July 26 to the clerk's office for the 23rd Judicial District Court in Convent, T&B was advised that Judge Mire would be in Napoleonville that morning, and that T&B's Notice of Intent and the draft order setting a return day should be presented to him there.

A paralegal was dispatched to Napoleonville to present the Notice and order. Upon arrival, he was advised that the judge had left and had returned to his offices in Donaldsonville. With the aid of two deputy clerks in Napoleonville, the judge's office was called to coordinate presentation of T&B's papers. The paralegal was advised to proceed to Donaldsonville so that the judge could review and sign them.

When he arrived in Donaldsonville, the paralegal was informed that the judge had left for the day, and that he would not be available to sign any orders. The original Notice and order were left with the judge's staff, with the request that the signed order be faxed to undersigned counsel immediately upon execution.

On the morning of July 27 undersigned counsel was contacted by this Court's clerk's office, requesting that the

signed return-day order be filed into the record. Additional calls were made to Judge Mire's office in an attempt to determine when the executed order would be transmitted to T&B's counsel. The judge's staff was noncommittal, and indicated that they could not say when, or if, the judge would review and sign the order. Later in the day on July 27 the judge's office advised that the order would be reviewed and signed that afternoon or on the morning of Friday, July 28.

When counsel inquired about the status of the order after Noon on Friday, the judge's office advised that it had been reviewed and acted, on, but that it was enroute to the clerk's office in Convent.[1] A copy of the proposed order was finally obtained by fax from the clerk's office in Convent, and it attached hereto as Exhibit 3. For reasons not articulated in the order, the district court has refused to set a return day for T&B's writ.

As fully described in T&B's original application, this writ is sought in an effort to put an end to the continuous harassment T&B has received at the hands of plaintiff Terrence Hayes and his counsel, Walter Dumas. It is Mr. Hayes's contention that he holds a valid and enforceable judgment against T&B, despite this Court's unequivocal ruling in the underlying appeal (rendered on March 28, 2006), reversing the trial court's grant of JNOV and reinstating the jury verdict. In furtherance of this position Hayes sought, and obtained, an order of "enforcement" of the claimed money judgment from the district court, and it is that order that is the subject of T&B's writ application.

---

[1] Counsel had expressly requested that the order be faxed to his office.

In an attempt to prevent this Court from even considering the merits of T&B's writ application, Mr. Hayes, through counsel, has apparently filed a "Motion to Dismiss/Alternatively, Opposition to Thomas and Betts' Notice of Intent to Seek Supervisory Writ, Request for Return Date, and Motion for Stay." (See Exhibit 1, attached) The essence of this motion is that the district court cannot order a return day for the writ because T&B has no right to seek supervisory review of the district court's judgment granting the "Motion to Enforce."[2]

As this Court knows well, it is within the discretion of a Louisiana court of appeal to review an order or judgment of a district court under the court's supervisory powers. Indeed, this proposition is so firmly entrenched that it is set forth in the Uniform Rules – Court Of Appeal:

> In the interests of judicial efficiency and fairness to the parties, an appellate court in its discretion may review an interlocutory or final judgment pursuant to its supervisory jurisdiction, even though the judgment also could be reviewed pursuant to an appeal. See *Chambers v. LeBlanc*, 598 So.2d 337 (La. 1992); *Winston v. Martin*, 34,195 (La. App. 2 Cir. 7/6/00), 764 So. 2d 368; *Smith v. Louisiana Dept. of Public Safety*, 90-1029 (La. App. 3 Cir. 10/15/90), 571 So.2d 666; *Hamilton Medical Group v. Ochsner Health Plan*, 550 So.2d 290 (La. App 3 Cir. 1989). [Rule 4-3, Revision Comment.]

---

[2] This motion came on the heels of an earlier communication from Mr. Dumas requesting that Thomas and Betts forward its check for $6,334,053.08, as payment for Mr. Hayes's "judgment" (See Exhibit 2 – attached).

There is no legal justification for Hayes's motion. It is nothing more than an attempt to prevent this Court from reviewing the merits of T&B's writ application on the pretext that the district court cannot enter an order setting a return day. As a practical matter, whatever return day is specified by the district court is irrelevant as the application has already been filed. The purpose of a return-day order is to impose a time limit on parties within which they must file their application so that there is no undue delay in the trial-court proceedings. As there are no other trial-court proceedings in this case, and given that the application has already been prepared and filed, there is little to be gained by strict adherence to the rule requiring a return-day order.

Nevertheless, T&B does recognize its obligation to adhere to the rules of this Court. But when compliance with those rules is frustrated by the unilateral actions of others, T&B should not be penalized. As the Fourth Circuit noted in a similar situation, "Although a relator should not be refused if a trial judge refuses to perm the taking of an appeal, the relator must make a timely and genuine attempt to have the order signed." *City of New Orleans v. Benson*, 95-2346 (La. App. 4 Cir. 12/4/95), 665 So. 2d 1202, 1204.

Thomas and Betts has made "timely and genuine attempt[s]" to have the return-day order signed, and has been unsuccessful due to no fault of its own. As the source of this rule is not found in constitutional or statutory provisions, but rather the Court's own inherent authority,

the requirement can and should be relaxed given these extraordinary circumstances.

Respectfully submitted,

ADAMS AND REESE LLP

/s/ Louis C. LaCour
Louis C. LaCourt, Jr. #14102
Raymond C. Ward, #20404
4500 One Shell Square
New Orleans, Louisiana 70139
Tel. (504) 585-0328
Fax: (504) 553-9482
Email: louis.lacour@arlaw.com

Counsel for Petitioner,
Thomas and Betts Corp.

Certificate of Service

I certify that a copy of this paper, with all exhibhits [sic], has been served by fax on the following persons:

Walter C. Dumas, #5163
Patti Durio Hatch #22719
Dumas & Associates Law Corp.
The Lawyer's Complex
1263 Government Street
P.O. Box 1366
Baton Rouge, Louisiana, 70821-1366
(225) 383-4701
Fax: (225) 383-4719

– and –

Hon. Pegram J. Mire, Jr.
Judge, 23rd Judicial District Court
114 Nichols Avenue
Donaldsonville, Louisiana 70346
(225) 473-8714
Fax: (225) 473-4997

/s/ Louis C. LaCour
Louis C. LaCour, Jr.

APPENDIX I

COURT OF APPEAL
FIFTH CIRCUIT
STATE OF LOUISIANA

No. 06-C-555

IN RE: GRAMERCY PLANT EXPLOSION AT KAISER

Terrence Hayes' Opposition to Thomas & Betts Corp.'s Application for Supervisory Writ and Exceptions

---

Walter C. Dumas, La. Bar Roll No. 5163
Patti Durio Hatch, La. Bar Roll No. 22719
DUMAS & ASSOCIATES LAW CORPORATION
Lawyer's Complex
1263 Government Street
Post Office Box 1366
Baton Rouge, Louisiana 70821-1366
Telephone:(225) 383-4701
Facsimile: (225) 383-4719

Attorneys for plaintiff, Terrence Hayes

INDEX

Statement of the Case 1

Statement of Jurisdiction 6

Issues Presented for Determination 8

Law and Analysis 9

I. Jurisdiction 9

II. Thomas & Betts Corp.'s Writ Application Is Barred by *Res Judicata* 10

III. The Final Judgment Rendered by this Honorable Court on March 28, 2006, cannot be Amended to Include Terrence Hayes' Judgment Notwithstanding the Verdict 14

IV. Plaintiff-Appellee's Motion to Enforce Judgment Is an Appropriate Motion 15

Conclusion 15

Affidavit of Service 16

Appendix

Exhibit 1: Terrence Hayes' Motion for Judgment Notwithstanding the Verdict and Alternatively, Motion for New Trial And Change of Venue

Exhibit 2: The trial court's Judgment and Reasons in Terrance Hayes' Motion for Judgment Notwithstanding the Verdict

Exhibit 3: Judgment of this Honorable Court rendered March 28, 2006 Exhibit 4: Trial Court's Judgment of July 20, 2006

Exhibit 5: This Honorable Court's July 7, 2006, writ denial, No. 06-C-453

Exhibit 6: Thomas & Betts Corp.'s original appellate brief, Appeal No. 04-C-1151 through 04-C-1191

Exhibit 7: Thomas & Betts Corp.'s Petition for Writ of Prohibition directed to the 23rd Judicial District Court, Parish of St. James, Hon. Pegram J. Mire, Jr., Judge

Exhibit 8: Form 10-Q Thomas & Betts Corp.'s Quarterly Report filed May 5, 2006, for the period ending March 31, 2006

Exhibit 9: Terrence Hayes' Motion to Enforce Judgment without attached exhibits

STATEMENT OF THE CASE

On July 5, 1999, Terrence Hayes went to work at his place of employment, Kaiser Aluminum and Chemical Corp.'s plant in Gramercy, Louisiana. Mr. Hayes was a digestive outside operator who worked the evening shift which was from 6:00 p.m. to 6:00 a.m.

Shortly before 6:00 a.m., there was a power outage at the Kaiser plant. Mr. Hayes was instructed to go into the control room. After arriving in the control room, Mr. Hayes, along with Albert Jones and Walter Robbins, were instructed by Walter Hansley, supervisor of the outside control board operators at Kaiser, to go outside and close the vent valves. While in the process of attempting to close the vents, there was a violent explosion which knocked the three men backwards. Mr. Hayes was found severely burned and unable to see by Mr. Hansley. Mr. Hansley carried Mr. Hayes to an area where the showers were located and attempted to rinse the caustic material from Mr. Hayes' body. Thereafter, Mr. Hayes was transported by ambulance to St. James Hospital.

After arriving at the hospital, it was discovered that Mr. Hayes had caustic in his eyes and burns on his neck, back, arms, testicles, legs, and buttocks. Mr. Hayes was subsequently transferred to the Tulane Medical Center, New Orleans, Louisiana, for treatment to his eyes and body.

As a result of his injuries and prior to the October 8, 2001, trial date, Mr. Hayes endured in excess of twenty (20) surgeries on his eyes, none of which repaired his eyesight. Mr. Hayes is totally blind in his left eye, and he has limited, blurry vision in his right eye. On July 3, 2000, Mr. Hayes filed suit to recover damages for his injuries.

Trial began on October 8, 2001, in this Honorable Court and ended November 19, 2001. The jury returned a verdict of fault as follows: (1) Kaiser 75%, (2) PCS 20%, and (3) Excel 5%, and awarded damages of $20,307,000 ($21,000,000) to Terrence Hayes.

Terrence Hayes filed a motion for judgment notwithstanding the verdict, a new trial, and change of venue separate and apart from the judgment notwithstanding the verdict filed by Kaiser and AXA. (Exhibit 1)

The trial court granted Mr. Hayes' JNOV and reallocated fault: (1) Kaiser 60%, (2) Thomas & Betts Corp. 25%, (3) PCS 10%, and (4) Excel 5%. (Exhibit 2) Also, the trial court granted Mr. Hayes' alternative motions for a new trial and for a change of venue.

Thomas & Betts Corp. moved the trial court for an Order of Suspensive Appeal from the judgment rendered and signed on December 16, 2002. On January 13, 2003, the trial court granted Thomas & Betts Corp. a suspensive appeal upon furnishing security in the amount of $156,000,000.

Mr. Hayes filed a devolutive appeal. On October 2, 2004, the record herein was lodged with this Honorable Court.

Terrance Hayes filed a motion to dismiss his appeal, and on November 19, 2004, the Order of Dismissal was granted by this Honorable Court.

On page 13 of its brief filed in this Honorable Court, Thomas & Betts Corp. set forth its Assignment of Errors as follows:

1. The trial court usurped the jury's fact-finding function when it ignored substantial record evidence supporting the jury's verdict and granted Kaiser's and AXA's Motion for Judgment Notwithstanding the Verdict.

2. The trial court erroneously ordered a (conditional) new trial despite the absence of any prejudicial irregularity in the course of the trial.

3. The trial court's grant of a change of venue (in the event of a new trial) is unsupported by the record and is inconsistent with La. C.C.P. art. 122.

4. The trial court erred by failing to exclude damages to non-Kaiser entities from its award and by failing to reduce the award to account for depreciation and for operational betterments inherent in the rebuilt plant.

The Assignment of Errors applies only to the Judgment Notwithstanding the Verdict granted to Kaiser and AXA.

The name of Terrence Hayes is mentioned only three times in Thomas & Betts Corp.'s brief, all under the heading **STATEMENT OF THE CASE**. On one occasion, Hayes is mentioned as an employee of Kaiser who filed a personal injury suit. On the other two (2) occasions, Terrence Hayes' name is mentioned when setting forth his damages award.

In the conclusion of its brief, Thomas & Betts Corp. states "The jury's verdict is reasonable, and the trial court has not articulated a single specific thing that made this

process unfair to Kaiser." Terrence Hayes is not mentioned.

The appeal was argued before this Honorable Court on January 9, 2006, and the Court rendered its opinion on March 28, 2006. (Exhibit 3) Thomas & Betts did not request a rehearing to address Hayes' JNOV.

On page 7 of this Honorable Court's opinion, the Court sets forth the issues it considered as follows:

1. The trial court usurped the jury's fact-finding function when it ignored substantial record evidence supporting the jury's verdict, and granted Kaiser's and AXA's motion for judgment notwithstanding the verdict.

2. The trial court erroneously ordered a (conditional) new trial despite the absence of any prejudicial irregularity in the course of the trial.

3. The trial court's grant of a change of venue (in the event of a new trial) is unsupported by the record and is inconsistent with La. C.C.P. art. 122.

4. The trial court erred by failing to exclude damages to non-Kaiser entities from its award and by failing to reduce the award to account for depreciation and for operational betterments inherent in the rebuilt plant.

The issues considered by the Fifth Circuit Court of Appeal in reaching its decision are identical to the Assignment of Errors set forth in the brief of Thomas & Betts Corp.

As equally important under the heading **DECREE**, this Honorable Court states in part "costs of this appeal are assessed to the appellees, Kaiser and AXA." Terrence Hayes is not mentioned.

Terrence Hayes' JNOV was abandoned on appeal in this Honorable Court.

In the appeal process, abandonment does not become an issue until after the briefing period and argument. It was impossible for plaintiff-appellee, Terrence Hayes, to determine whether his JNOV had been abandoned until after the delays for requesting a rehearing had expired.

To reverse the July 20, 2006, judgment of the trial court would be a denial of plaintiff appellee, Terrence Hayes', due process and equal protection of the law as guaranteed by the United States Constitution, the Louisiana Constitution, and other applicable statutes and laws. Further, it would be the taking of property in violation of Terrance Hayes' due process rights and equal protection rights as guaranteed by the United States and Louisiana Constitutions and applicable state laws.

STATEMENT OF JURISDICTION

This Honorable Court does not have jurisdiction in this matter. The original judgment of this Honorable Court of March 28, 2006, is a final judgment. The judgment cannot be amended by the same panel or a different panel that rendered the March 28, 2006, opinion. *Rivet v. State of Louisiana, Department of Transportation and Development*, 680 So.2d 1154, 96-0145 (La. 9/5/96).

Thomas & Betts' application for supervisory writs is requesting this Honorable Court to amend its March 28, 2006, opinion. The proper procedure was for Thomas & Betts to have applied for a rehearing to address Hayes' judgment notwithstanding the verdict. Also, Thomas & Betts could have filed writs in the Louisiana Supreme Court. Thomas & Betts decided to do neither.

When a court renders a judgment that decides the merits of the case in whole or in part, the judgment is a final judgment. C.C.P. Art. 1841. The July 20, 2006, judgment of the trial court is final. (Exhibit 4) It is only subject to an appeal, not a writ.

A final judgment may be rendered by either a trial court or an appellate court, and a judgment by an appellate court that decides the merits of the case is a final judgment regardless of whether the case reached the merits.

On July 7, 2006, this Honorable Court denied an application for writs filed by Thomas & Betts that was seeking the same relief as set forth in this writ application. (Exhibit 5) Accordingly, this writ application is barred by *res judicata*.

Once a final judgment acquires the authority of the thing adjudged, no court has jurisdiction, in the sense of power and authority to modify, revise or reverse the judgment, regardless of the magnitude of the error in the final judgment. *Tolis v. Board of Supervisors of Louisiana State University*, 660 So.2d 1206, 95-1529 (La. 10/16/95).

The March 28, 2006, decision of this Honorable Court is controlling and final even though the Court may have

intended otherwise. See *Madere v. St. John the Baptist Parish*, 900 So.2d 73, 04-1036 (La. App. 5 Cir. 3/1/05).

ISSUES PRESENTED FOR DETERMINATION

1. Whether this Honorable Court has jurisdiction to decide Thomas & Betts' writ application.
2. Whether the issues raised in Thomas & Betts' writ application are barred by *res judicata*.
3. Whether the writ application is an attempt to amend a final judgment of this Honorable Court after the delay for applying for a rehearing has expired.

LAW AND ANALYSIS

I. JURISDICTION

The judgment of the trial court is a final judgment and may only be subject to an appeal. A final judgment cannot be the subject of a writ application. Thomas & Betts Corp.'s only remedy to the July 20, 2006, judgment is by appeal.

A judgment rendered by a court which has no jurisdiction over the subject matter of the action or proceeding is void. *Ponthieux v. Lindsay,* 216 So.2d 407 (La. App. 3rd Cir. 1968) and La. C.C.P. Art. 3.

Jurisdiction is not a discretionary matter. If in law and in fact jurisdiction is lacking, the case must be dismissed on those grounds rather than to be considered on its merits.

Jurisdiction is the legal power and authority of a court to hear and determine an action or proceeding involving

the legal relations of the parties, and to grant the relief to which they are entitled. La. C.C.P. Art. 1.

Thomas & Betts Corp. filed an application for writs involving the same issue herein and involving the same plaintiff and defendant in case No. 06-C-453 in this Honorable Court. The writ was denied on July 7, 2006. (See Exhibit 5) Denying the writ instead of issuing a WRIT NOT CONSIDERED ORDER bars this writ due to *res judicata*.

More importantly, the July 20, 2006, judgment of the trial court which is the subject of this writ application is a final judgment. Thomas & Betts Corp.'s remedy, if any, is by appeal.

II. THOMAS & BETTS CORP.'S WRIT APPLICATION IS BARRED BY *RES JUDICATA*.

The relief Thomas & Betts Corp. is seeking in this writ application is the same relief it sought in the appeal before this Honorable Court in In re: Gramercy Plant Explosion at Kaiser, Docket No. 04 CA 1151 c/w and through 04 CA 1191 and the writ application in case No. 06-C-453. (Exhibit 6) This Honorable Court rendered its decision in the Gramercy Plant Explosion case on March 28, 2006. Thomas & Betts Corp. did not file for a rehearing, therefore the judgment became final fourteen (14) days thereafter. The writ application in No. 06-C-453 was denied by this Honorable Court. The actions of Thomas & Betts Corp. are barred in both cases by *res judicata*.

Thomas & Betts Corp. cites the cases of *Georgia Gulf Corp. v. Board of Ethics for Public Employees,* 694 So.2d

173, 96-1907 (La. 5/9/97) and *Nicholas v. Allstate Insurance Co.*, 765 So.2d 1017, 99-2522 (La. 8/31/00) in support of its writ application. These cases are not applicable to this case.

The action taken by the appellate court was taken while the cases were before the court. Thomas & Betts Corp. could have taken action before and during oral argument to attempt to show and/or prove to this Honorable Court that Terrence Hayes' judgment notwithstanding the verdict had not been abandoned.

Further, after receiving a copy of the March 28, 2006, decision, Thomas & Betts could have requested a rehearing to address Terrence Hayes' judgment notwithstanding the verdict. Finally, Thomas & Betts Corp. could have applied for writs to the Louisiana Supreme Court to address Terrence Hayes' judgment notwithstanding the verdict. Nothing was done during the three opportunities Thomas & Betts had to address Terrence Hayes' judgment notwithstanding the verdict.

The present case is distinguishable from the Georgia Gulf Corp. and Nicholas cases in that the appellate court addressed due process issues and issues not assigned as errors while those cases were pending before the appellate court. The appellate court had jurisdiction. In this case, nothing is pending because the March 28, 2006, judgment is final and has been final since April 10, 2006, the deadline for requesting a rehearing in reference to the March 28, 2006, judgment.

More importantly, if this Honorable Court wanted its decision to apply to Terrence Hayes, even if there was no assignment of error as to him or no argument made as to

his JNOV, it could have done so pursuant to Uniform Rules-Courts of Appeal Rule-1 which provides:

> **Rule 1-3. Scope of Review**
>
> The scope of review in all cases within the appellate and supervisory jurisdiction of the Courts of Appeal shall be provided by LSA-Const. art. 5, § 10(B), and as otherwise provided by law. The Courts of Appeal will review only issues which were submitted to the trial court and which are contained in specifications or assignments of error, *unless the interest of justice clearly requires otherwise.*

See also La. C.C.P. Art. 2164, *Young v. Our Lady of the Lake Regional Medical Center,* 2003-2653 p. 5-6 (La. App. 1st Cir. 12/30/04) 898 So.2d 428 and *Wood v. Brian Harris Autoplex,* 2004-1316 (La. App. 1st Cir. 8/3/05).

Thomas and Betts Corp. now argues that Terrence Hayes' JNOV was in the mind of this Honorable Court, but this Honorable Court just did not put it in its decision of March 28, 2006.

It appears that Terrence Hayes' JNOV was only in the mind of Thomas and Betts Corp.'s counsel who admits this fact on page 10, footnote 9, of the Petition for Writ of Prohibition filed in this Honorable Court in No. 06-C-453 when he states "this court knew, as T&B knew, that the party carrying the ball on the JNOV Motion were Kaiser and AXA, and that the issues and arguments were identical." (Exhibit 7) This same fact is admitted in this writ application in the footnote on page 9. This clearly shows Thomas and Betts Corp. was only concerned with the JNOV of Kaiser and AXA.

In *Shear v. Shear,* 695 So.2d 1026, this Honorable Court held the assigning of error but not briefing the error, but only arguing the error is deemed abandoned under Uniform Rules Courts of Appeal 2-12.4.

Other appellate courts have ruled that failure to assign error constitutes an abandonment of the appeal. In *McGowan v. Ramey,* 484 So.2d 785 (La. App. 1st Cir. 2/25/86), the First Circuit held that an appellant who brought an appeal but failed to assign error "constituted abandonment of the appeal." In *Thomas v. Janzen,* 800 So.2d 81 (La. App. 2nd Cir. 10/3/01), the Second Circuit held the failure to raise as an assignment of error constitutes abandonment of the appeal. In *Vaughn v. Progressive Security Insurance,* 896 So.2d 1207 (La. App. 3rd Cir. 3/2/05), the Third Circuit held assigned errors not briefed are deemed abandoned and are not addressed by the Court. Citing Uniform Rules-Courts of Appeal, Rule 2-12.4.

To further show that Thomas and Betts Corp. had abandoned Terrence Hayes' JNOV, Thomas and Betts Corp.'s Form 10-Q filing with the U.S. Securities and Exchange Commission (SEC) for the period ending March 31, 2006, and filed on May 5, 2006, (Exhibit 8) under the heading Contingencies, Legal Proceedings, Kaiser Litigation, beginning on page 16 and ending on page 17, states on page 17 the following:

> "In March 2006, the Louisiana Court of Appeals unanimously reversed the trial court's decision and reinstated the jury verdict of no liability in favor of the Corporation. In April 2006, the plaintiffs filed with the Louisiana Supreme Court an

> appeal of the Court of Appeals decision. Management intends to vigorously contest the appeal by plaintiffs."

Even in its SEC filing, Thomas and Betts Corp. states that *the plaintiffs,* not some of the plaintiffs filed with the Louisiana Supreme Court. This is not correct. Terrence Hayes did not file a writ with the Louisiana Supreme Court. The SEC filing does not state that Terrence Hayes did not file a writ with the Louisiana Supreme Court. Again, Thomas and Betts Corp. was only concerned with Kaiser and AXA's JNOV. Therefore, the SEC filing is consistent with Thomas and Betts Corp.'s actions as being concerned and applicable only to Kaiser and AXA.

This Honorable Court on July 7, 2006, denied a writ application, No. 06-C-453 filed by Thomas & Betts Corp. The relief Thomas & Betts Corp. is seeking in this writ application is the same relief sought in case No. 06-C-453 and involves the same parties. How many times may a party seek the same relief on the same issues in the same court and between the same parties? See La. C.C.P. Art. 927A(2).

III. The Final Judgment Rendered By This Honorable Court On March 28, 2006, Cannot Be Amended To Include Terrence Hayes' Judgment Notwithstanding The Verdict.

Once a final judgment acquires the authority of the thing adjudged, no court has jurisdiction, in the sense of power and authority, to modify, revise or reverse the judgment, regardless of the magnitude of the error in the judgment. *Tolis, Id.*

After this Honorable Court issued its judgment of March 28, 2006, Thomas & Betts Corp. had the right to apply for a rehearing in this court or apply for writs in the Louisiana Supreme Court contesting the March 28 2006, judgment as it related to Terrence Hayes' JNOV. Thomas & Betts failed to request a rehearing or file an application for writs in the Louisiana Supreme Court. As a result of the failure of Thomas & Betts Corp. to do either of the above, the March 28, 2006, judgment of this Honorable Court became final.

A final judgment may be rendered by either a trial court or an appellate court, and a judgment by an appellate court that decides the merits of the case is a final judgment, regardless of whether the case reached the appellate court on appeal or on supervisory writs.

If this Honorable Court grants Thomas & Betts Corp.'s writ application, it would be making a substantive amendment to this Honorable Court's March 28, 2006, judgment without recourse to proper procedures, i.e., through [sic] a rehearing is an absolute nullity. *Madere. Id.*

The appellate court is forbidden by law and jurisprudence to consider evidence which is outside the record on appeal. *Barrios v. Wal-Mart Stores, Inc.,* 703 So.2d 798 (La. App. 5 Cir. 11/25/97); LSA-C.C.P. Arts. 2128, 2164.

IV. Plaintiff-Appellee's Motion to Enforce Judgment Is an Appropriate Motion.

Plaintiff-Appellee's Motion to Enforce Judgment is an appropriate motion and not subject to the provisions of La. C.C.P. Art. 863. (Exhibit 9)

After the hearing, the trial court granted the Motion to Enforce Judgment. During the hearing, Thomas & Betts Corp. did not argue or present any evidence on its request for sanctions. More importantly, Thomas & Betts Corp. does not present to this Honorable Court in this writ application the issue of sanctions nor are sanctions listed as an assignment of error. (See page 7 of Thomas & Betts Corp.'s Application for Supervisory Writ).

CONCLUSION

This Honorable Court should dismiss the writ application for the reasons stated above.

And for all statutory, general and equitable relief in the premises.

Respectfully Submitted:

/s/ Walter C. Dumas
Walter C. Dumas (Bar Roll No. 5163)
Patti Durio Hatch (Bar Roll No. 22719)
DUMAS & ASSOCIATES LAW CORPORATION
Lawyer's Complex
1263 Government Street
Post Office Box 1366
Baton Rouge, Louisiana, 70821-1366
Telephone: (225) 383-4701

AFFIDAVIT OF SERVICE

STATE OF LOUISIANA

PARISH OF EAST BATON ROUGE

Before me, the undersigned Notary Public in and for the parish and state aforementioned, did personally come and appear Walter C. Dumas, who after being sworn did depose and say that the preceding Opposition to Thomas & Betts Corp.'s Application for Supervisory Writ has been hand-served on:

The Hon. Pegram J. Mire, Jr.,
Judge
23rd Judicial District Court
305 Chetimaches Street
Donaldsonville, Louisiana 70346

Ernest P. Gieger, Jr.
Andrew A. Braun
GIEGER, LABORDE &
LAPEROUSE, LLC
4800 One Shell Square
New Orleans, Louisiana 70139

Louis C. LaCour, Jr.
Robert N. Markle
Raymond P. Ward
ADAMS AND REESE, LLP
4500 One Shell Square
New Orleans, Louisiana
70139

Robert E. Winn
Sharon Cormack Mize
SESSIONS, FISHMAN &
NATHAN, LLP
201 St. Charles Avenue,
35th Floor
New Orleans, Louisiana
70170

/s/ Walter C. Dumas
Walter C. Dumas

SWORN TO AND SUBSCRIBED
before me, Notary Public,
this 28th day of July, 2006

/s/ Travis J. Turner
Travis J. Turner
NOTARY PUBLIC
La. Bar Roll No. 29462
My Commission Expires at Death

APPENDIX J

TWENTY-THIRD JUDICIAL DISTRICT

PARISH OF ST. JAMES

STATE OF LOUISIANA

IN RE: GRAMERCY PLANT EXPLOSION AT KAISER	**MASTER DOCKET NO. 25,975**
	DIVISION "D"

MOTION TO ENFORCE JUDGMENT AND FOR AN ORDER DIRECTING CLERK OF COURT, THOMAS & BETTS CORP. AND ITS SECURITY INSURERS TO SHOW CAUSE WHY THE MONEY JUDGMENT RENDERED IN FAVOR OF TERRENCE HAYES SHOULD NOT BE SATISFIED

(Filed June 1, 2006)

NOW INTO COURT comes plaintiff, Terrence Hayes, through undersigned counsel, who moves for an Order directing the Clerk of Court, Thomas & Betts Corp. and its security insurers to pay Thomas & Betts Corp.'s 25 percent fault allocation of the judgment rendered herein on December 16, 2002, in favor of Terrence Hayes for the following reasons; to wit:

1.

On November 19, 2001, a jury in the above matter awarded damages to Terrence Hayes in the amount of $20,307,000 for injuries sustained as a result of an explosion occurring at the Kaiser Facility, Gramercy, Louisiana, on July 5, 1999.

2.

The jury apportioned fault for the July 5, 1999, explosion as follows:

Kaiser	75%
PCS	20%
MEI	5%

3.

After the jury's verdict, Terrence Hayes filed a motion for judgment notwithstanding the verdict (JNOV) and, alternatively, a motion for new trial and change of venue.

4.

On December 16, 2001, this Honorable Court in granting the Judgment Notwithstanding the Verdict reallocated fault as follows:

Kaiser	60%
Thomas & Betts Corp.	25%
PCS	10%
MEI	5%

5.

The Judgment Notwithstanding the Verdict did not alter the amount of damages the jury awarded to Terrence Hayes.

6.

Thomas & Betts Corp. moved this Honorable Court for an Order of Suspensive Appeal from the judgment rendered and signed on December 16, 2002. On January 13,

2003, this Honorable Court granted Thomas & Betts Corp. a suspensive appeal upon furnishing security in the amount of $156,000,000.

7.

Pursuant to the Order of this Honorable Court, Thomas & Betts; Corp. furnished security as follows:

Federal Insurance Company	$86,456,281
The Insurance Company of the State of Pennsylvania	$25,764,008
Great American Insurance Company	$44,474,886

8.

On January 17, 2003, Terrence Hayes filed a devolutive appeal.

9.

On October 2, 2004, the record herein was lodged with the Fifth Circuit Court of Appeal.

10.

Terrence Hayes filed a motion to dismiss his appeal, and on November 19, 2004, the Order of Dismissal was granted by the Fifth Circuit Court of Appeal.

11.

On page 13 of its brief filed in the Fifth Circuit Court of Appeal, Thomas & Betts Corp. set forth its Assignment of Errors as follows:

1. The trial court usurped the jury's fact-finding function when, it ignored substantial record evidence supporting the jury's verdict and granted Kaiser's and AXA's Motion for Judgment Notwithstanding the Verdict.

2. The trial court erroneously ordered a (conditional) new trial despite the absence of any prejudicial irregularity in the course of the trial.

3. The trial court's grant of a change of venue (in the event of a new trial) is unsupported by the record and is inconsistent with La. C.C.P. Art. 122.

4. The trial court erred by failing to exclude damages to non Kaiser entities from its award and by failing to reduce the award to account for depreciation and for operational betterments inherent in the rebuilt plant.

The Assignment of Errors only applies to the Judgment Notwithstanding the Verdict granted to Kaiser and AXA. (Exhibit A)

12.

The name of Terrence Hayes is mentioned only three times in Thomas & Betts Corp.'s brief, all under the heading **STATEMENT OF THE CASE**. On one occasion, Hayes is mentioned as an employee of Kaiser who filed a personal injury suit. On the other two (2) occasions, Terrence Hayes' name is mentioned when setting forth his damages award.

13.

In the conclusion of its brief, Thomas & Betts Corp. states "The jury's verdict is reasonable, and the trial court has not articulated a single specific thing that made this process unfair to Kaiser." Terrence Hayes is not mentioned.

14.

The appeal was argued before the Court of Appeal, Fifth Circuit, on January 9, 2006, and the Court rendered its opinion on March 28, 2006.

15.

On page 7 of the Fifth Circuit Court of Appeal's opinion, the Court sets forth the issues it considered as follows:

1. The trial court usurped the jury's fact-finding function when it ignored substantial record evidence supporting the jury's verdict, and granted Kaiser's and AXA's motion for judgment notwithstanding the verdict.

2. The trial court erroneously ordered a (conditional) new trial despite the absence of any prejudicial irregularity in the course of the trial.

3. The trial court's grant of a change of venue (in the event of a new trial) is unsupported by the record and is inconsistent with La. C.C.P. art. 122.

4. The trial court erred by failing to exclude damages to non-Kaiser entities from its

award and by failing to reduce the award to account for depreciation and for operational betterments inherent in the rebuilt plant.

16.

The issues considered by the Fifth Circuit Court of Appeal in reaching its decision are identical to the Assignment of Errors set forth in the brief of Thomas & Betts Corp.

17.

The issue of Terrence Hayes' Judgment Notwithstanding the Verdict was not before nor addressed by the Fifth Circuit Court of Appeal.

18.

Alternatively, if it is determined that Thomas & Betts Corp. appealed Mr. Hayes Judgment Notwithstanding the Verdict, this appeal was abandoned.

19.

More importantly, under the heading **DAMAGES**, the Fifth Circuit Court of Appeal states that "our reversal of the JNOV also eliminates the trial court's award of damages to Kaiser; hence, we need not address T&B's assignment of error on this issue." (Exhibit B) Damages awarded to Terrence Hayes are not mentioned.

20.

As equally important under the heading **DECREE**, the Fifth Circuit Court of Appeal states in part "costs of

this appeal are assessed to the appellees, Kaiser and AXA." Terrence Hayes is not mentioned.

21.

The Judgment Notwithstanding the Verdict rendered in favor of Terrence Hayes is final, and Thomas & Betts Corp. should pay its 25 percent of the judgment with judicial interest according to law.

WHEREFORE, Terrence Hayes moves that this Honorable Court order the Clerk of Court, Thomas & Betts Corp., and its security insurers, Federal Insurance Company, The Insurance Company of the State of Pennsylvania, and Great American Insurance Company to show cause why they should not pay Thomas & Betts Corp.'s 25 percent of the judgment rendered and signed on December 16, 2002, with interest according to law out of the security posted on behalf of Thomas & Betts Corp.

And for all statutory, general, and equitable relief in the premises.

Respectfully Submitted:

Walter C. Dumas (Bar Roll No. 5163)
Patti Durio Hatch (Bar Roll No.: 22719)
DUMAS & ASSOCIATES LAW CORPORATION
The Lawyer's Complex
1263 Government Street
Post Office Box 1366
Baton Rouge, Louisiana 70821-1366
Telephone: (225) 383-4701

By: /s/ Walter C. Dumas
Walter C. Dumas
(Bar Roll No. 5163)

PLEASE SERVE:

The Honorable Edmond E. Kinler, Jr.
Clerk of Court, Parish of St. James
Courthouse
5800 Highway 44
Convent, Louisiana 70723

Thomas & Betts Corp.
through its Attorneys of Record:

Louis C. LaCour, Jr.
Robert N. Markle
Raymond P. Ward
ADAMS AND REESE, LLP
4500 One Shell Square
New Orleans, Louisiana 70139

-and-

Ernest P. Gieger, Jr.
Andrew A. Braun
GIEGER, LABORDE & LAPEROUSE, LLC
4800 One Shell Square
New Orleans, Louisiana 70139

-and-

Robert E. Winn
Sharon Cormack Mize
SESSIONS, FISHMAN & NATHAN, LLP
201 St. Charles Avenue, 35th Floor
New Orleans, Louisiana 70170-3500

Federal Insurance Company
through its Attorneys of Record:

Louis C. LaCour, Jr.
Robert N. Markle
Raymond P. Ward
ADAMS AND REESE, LLP
4500 One Shell Square
New Orleans, Louisiana 70139

-and-

Ernest P. Gieger, Jr.
Andrew A. Braun
GIEGER, LABORDE & LAPEROUSE, LLC
4800 One Shell Square
New Orleans, Louisiana 70139

-and-

Robert E. Winn
Sharon Cormack Mize
SESSIONS, FISHMAN & NATHAN, LLP
201 St. Charles Avenue, 35th Floor
New Orleans, Louisiana 70170-3500

The Insurance Company of the State of Pennyslvania [sic] through its Attorneys of Record:

Louis C. LaCour, Jr.
Robert N. Markle
Raymond P. Ward
ADAMS AND REESE, LLP
4500 One Shell Square
New Orleans, Louisiana 70139

-and-

Ernest P. Gieger, Jr.
Andrew A. Braun
GIEGER, LABORDE & LAPEROUSE, LLC
4800 One Shell Square
New Orleans, Louisiana 70139

-and-

Robert E. Winn
Sharon Cormack Mize
SESSIONS, FISHMAN & NATHAN, LLP
201 St. Charles Avenue, 35th Floor
New Orleans, Louisiana 70170-3500

Great American Insurance Company
through its Attorneys of Record:

Louis C. LaCour, Jr.
Robert N. Markle
Raymond P. Ward
ADAMS AND REESE, LLP
4500 One Shell Square
New Orleans, Louisiana 70139

-and-

Ernest P. Gieger, Jr.
Andrew A. Braun
GIEGER, LABORDE & LAPEROUSE, LLC
4800 One Shell Square
New Orleans, Louisiana 70139

-and-

Robert E. Winn
Sharon Cormack Mize
SESSIONS, FISHMAN & NATHAN, LLP
201 St. Charles Avenue, 35th Floor
New Orleans, Louisiana 70170-3500

TWENTY-THIRD JUDICIAL DISTRICT

PARISH OF ST. JAMES

STATE OF LOUISIANA

IN RE: GRAMERCY PLANT EXPLOSION AT KAISER

MASTER DOCKET NO. 25975

DIVISION "D"

MEMORANDUM IN SUPPORT OF MOTION TO ENFORCE JUDGMENT AND FOR AN ORDER DIRECTING CLERK OF COURT, THOMAS & BETTS CORP., AND ITS SECURITY INSURERS TO SHOW CAUSE WHY THE MONEY JUDGMENT RENDERED IN FAVOR OF TERRENCE HAYES SHOULD NOT BE SATISFIED

(Filed June 1, 2006)

On July 5, 1999, Terrence Hayes went to work at his place of employment, Kaiser Aluminum and Chemical Corp.'s plant in Gramercy, Louisiana. Mr. Hayes was a digestive outside operator who worked the evening shift which was from 6:00 p.m. to 6:00 a.m.

Shortly before 6:00 a.m., there was a power outage at the Kaiser plant. Mr. Hayes was instructed to go into the control room. After arriving in the control room, Mr. Hayes, along with Albert Jones and Walter Robbins, were instructed by Walter Hansley, supervisor of the outside control board operators at Kaiser, to go outside and close the vent valves. While in the process of attempting to close the vents, there was a violent explosion which knocked the three men backwards. Mr. Hayes was found severely burned and unable to see by Mr. Hansley. Mr. Hansley carried Mr. Hayes to an area where the showers were

located and attempted to rinse the caustic material from Mr. Hayes' body. Thereafter, Mr. Hayes was transported by ambulance to St. James Hospital.

After arriving at the hospital, it was discovered that Mr. Hayes had caustic in his eyes and burns on his neck, back, arms, testicles, legs, and buttocks. Mr. Hayes was subsequently transferred to the Tulane Medical Center, New Orleans, Louisiana, for treatment to his eyes and body.

As a result of his injuries and prior to the October 8, 2001, trial date, Mr. Hayes endured in excess of twenty (20) surgeries on his eyes, none of which repaired his eyesight. Mr. Hayes is totally blind in his left eye, and he has limited, blurry vision in his right eye. On July 3, 2000, Mr. Hayes filed suit to recover damages for his injuries.

Trial began on October 8, 2001, in this Honorable Court and ended November 19, 2001. The jury returned a verdict of fault as follows: (1) Kaiser 75%, (2) PCS 20%, and (3) Excel 5%, and awarded damages of $20,307,000 ($21,000,000) to Terrence Hayes.

Terrence Hayes filed a motion for judgment notwithstanding the verdict, a new trial, and change of venue.

This Honorable Court granted Mr. Hayes' JNOV and reallocated fault: (1) Kaiser 60%, (2) Thomas & Betts Corp. 25%, (3) PCS 10%, and (4) Excel 5%. Also, this Honorable Court granted Mr. Hayes' alternative motions for a new trial and for a change of venue.

Thomas & Betts Corp. moved this Honorable Court for an Order of Suspensive Appeal from the judgment rendered and signed on December 16, 2002. On January 13, 2003, this Honorable Court granted Thomas & Betts Corp.

a suspensive appeal upon furnishing security in the amount of $156,000,000.

Pursuant to the Order of this Honorable Court, Thomas & Betts Corp. furnished security as follows:

Federal Insurance Company	$86,456,281
The Insurance Company of the State of Pennsylvania	$25,764,008
Great American Insurance Company	$44,474,886

Mr. Hayes filed a devolutive appeal.

On October 2, 2004, the record herein was lodged with the Fifth Circuit Court of Appeal.

Hayes filed a motion to dismiss his devolutive appeal, and on November 19, 2004, the motion was granted by the Fifth Circuit Court of Appeal.

Thomas & Betts Corp. on page viii of its brief filed in the Fifth Circuit Court of Appeal sets forth its Assignment of Errors as follows:

1. The trial court usurped the jury's fact-finding function when it ignored substantial record evidence supporting the jury's verdict and granted Kaiser's and AXA's Motion for Judgment Notwithstanding the Verdict.

2. The trial court erroneously ordered a (conditional) new trial. despite the absence of any prejudicial irregularity in the course of the trial.

3. The trial court's grant of a change of venue (in the event of a new trial) is unsupported by the record and is inconsistent with La. C.C.P. art. 122.

4. The trial court erred by failing to exclude damages to non-Kaiser entities from its award and by failing to reduce the award to account for depreciation and for operational betterments inherent in the rebuilt plant.

The Assignment of Errors applies only to the JNOV granted to Kaiser and AXA. In fact, no where in its brief filed in the Fifth Circuit Court of Appeal does Thomas & Betts Corp. mention the JNOV granted in favor of Terrence Hayes.

In the conclusion of its brief, Thomas & Betts Corp. does not mention Mr. Hayes. The conclusion refers only to Kaiser.

After hearing arguments on January 9, 2006, the Fifth Circuit Court of Appeal on March 28, 2006, rendered its opinion reversing the December 16, 2002, judgment of this Honorable Court granting a JNOV in favor of Kaiser and AXA and reinstating the jury verdict.

Also, the Fifth Circuit Court of Appeal assessed the costs of the appeal only to Kaiser and AXA. Terrence Hayes was not mentioned because his JNOV was not before the court and/or because it was abandoned by Thomas & Betts Corp.

In *Shear v. Shear*, 695 So.2d 1026 (La. App. 5 Cir. 5/28/97), rehearing denied, writ denied, 703 So.2d 632 (La. 11/14/97), the Fifth Circuit held the assigning of error but not briefing the error, but only arguing the error is deemed abandoned under Uniform Rules Courts of Appeal 2-12.4.

Other appellate courts have ruled that failure to assign error constitutes an abandonment of the appeal. In *McGowan v. Ramey*, 484 So.2d 785 (La. App. 1 Cir.

2/25/86), the First Circuit held that an appellant who brought an appeal but failed to assign error "constituted abandonment of the appeal." In *Thomas v. Janzen*, 800 So.2d 81 (La. App. 2 Cir. 10/3/01), the Second Circuit held the failure to raise as an assignment of error constitutes abandonment of the appeal. In *Vaughn v. Progressive Security Insurance*, 896 So.2d 1207 (La.App. 3 Cir. 3/2/05), the Third Circuit held assigned errors not briefed are deemed abandoned and are not addressed by the Court. Citing Uniform Rules-Courts of Appeal, Rule 2-12.4.

Mr. Hayes' judgment is final and must be satisfied. This Honorable Court should issue an Order to the Clerk of Court ordering him to pay the amount owed to Terrence Hayes from the appeal security posted by Federal Insurance Company, The Insurance Company of the State of Pennsylvania, and Great American Insurance Company on behalf of Thomas & Betts Corp.

And for all statutory, general, and equitable relief in the premises.

Respectfully Submitted:

Walter C. Dumas (Bar Roll No. 5163)
Patti Durio Hatch (Bar Roll No.: 22719)
DUMAS & ASSOCIATES LAW CORPORATION
The Lawyer's Complex
1263 Government Street
Post Office Box 1366
Baton Rouge, Louisiana 70821-1366
Telephone: (225) 383-4701

By: /s/ Walter C. Dumas
Walter C. Dumas
(Bar Roll No. 5163)

APPENDIX K

FORM 10-Q

THOMAS & BETTS CORP. – tnb

Filed: May 05, 2006 (period: March 31, 2006)

* * *

10. Contingencies

Legal Proceedings

Kaiser Litigation

By July 2000, Kaiser Aluminum, its property insurers, 28 Kaiser injured workers, nearby businesses and a class of 18,000 residents near the Kaiser facility in Louisiana, filed product liability and business interruption cases against the Corporation and six other defendants in Louisiana state court seeking damages in excess of $550 million. These cases alleged that a Thomas & Betts cable tie mounting base failed, thereby allowing bundled cables to come in contact with a 13.8 kV energized bus bar. This alleged electrical fault supposedly initiated a series of events culminating in an explosion which leveled 600 acres of the Kaiser facility.

A trial in the fall of 2001 resulted in a jury verdict in favor of the Corporation. However, 13 months later, the trial court overturned that verdict in granting plaintiffs' motions for judgment notwithstanding the verdict. In December 2002, the trial court judge found the Thomas & Betts' product, an adhesive backed mounting base, to be unreasonably dangerous and therefore assigned 25% fault to Thomas & Betts. The judge set the damages for an injured worker at $20 million and the damages for Kaiser at $335 million. The judgment did not address damages

for nearby businesses or the class of 18,000 residents near the Kaiser facility. The Corporation's 25% allocation was $88.8 million, plus legal interest. The Corporation appealed to the Louisiana Court of Appeals, an intermediate appellate court. The appeal required a bond in the amount of $104 million (the judgment plus legal interest). Plaintiffs successfully moved the trial court to increase the bond to $156 million. The Corporation's liability insurers have secured the $156 million bond. The case was briefed and in January 2006 was argued before the Louisiana Court of Appeals.

In March 2006, the Louisiana Court of Appeals unanimously reversed the trial court's decision and reinstated the jury verdict of no liability in favor of the Corporation. In April 2006, the plaintiffs filed with the Louisiana Supreme Court an appeal of the Court of Appeals decision. Management intends to vigorously contest the appeal by plaintiffs.

In 2004, the Corporation and the class of 18,000 residents reached a court-approved settlement. The settlement extinguished the claims of all class members and included indemnity of the Corporation against future potential claims asserted by class members or those class members who opted out of the settlement process. The $3.75 million class settlement amount was paid directly by an insurer of the Corporation. The claims of the nearby businesses have been partially dismissed and to date never pursued further.

* * *